80-1137

No. ———

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1980

APPALACHIAN INSURANCE COMPANY, et al.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether 33 U.S.C. § 702(c) of the Mississippi River Flood Control Act of 1928 only limits the liability of the United States for flood control projects on the Mississippi River, or also affords immunity to the United States for its negligence in causing the failure of the Teton Dam, a reclamation dam constructed in eastern Idaho?

2. Whether the United States is afforded immunity under 33 U.S.C. § 702(c) of the Mississippi River Flood Control Act of 1928 for its negligence in causing the failure of the Teton Dam, even though there has been no factual finding that the damages claimed were caused by "floods or flood waters" within the meaning of § 702 (c) and the statute authorizing the construction of the Teton Dam does not express that Teton Dam had any flood control purpose?

LIST OF PARTIES

This Petition for Writ of Certiorari is filed on behalf of the following Petitioners who appeared as plaintiffs in the proceedings below: Appalachian Insurance Company; Protection Mutual Insurance Company; Clearfield Insurance Limited; Canners Exchange Subscribers; Warners Reciprocal Insurers; and American Mutual Reinsurance Company.[1]

[1]Appalachian Insurance Company is a wholly-owned subsidiary of Allendale Associates, Inc., which is a wholly-owned intermediate holding company of Allendale Mutual Insurance Company. The underwriting manager for Appalachian Insurance Company is New Providence Corporation, which is also completely owned by Allendale Associates, Inc. Allendale Mutual Insurance Company is a member of the Factory Mutual System, which also includes Arkwright-Boston Manufacturers Mutual Insurance Company, Philadelphia Manufacturers Mutual Insurance Company, and Protection Mutual Insurance Company. Factory Mutual System Associates include Factory Mutual Engineering

and Research and Factory Mutual International. As noted, Protection Mutual Insurance Company, one of the petitioners here, is a member of the Factory Mutual System. Petitioner Clearfield Insurance Limited is a captive insurer wholly owned by Boise Cascade Company. Canners Exchange Subscribers and Warners Reciprocal Insurers are managed by Lansing B. Warner, Incorporated, an Illinois corporation. Other parties appearing as plaintiffs in the proceedings below are Aetna Insurance Company, North American Company for Property and Casualty Insurance, Highlands Insurance Company, Global Aviation Insurance Managers and Brokers, Inc., Sentry Insurance, a mutal company, H.R. Rokeby-Johnson Underwriters at Lloyds London, Preferred Risk Mutual Insurance Company, Federal Insurance Company, Motors Insurance Corporation, Aid Insurance Company (Mutual) and Amco Insurance Company, American States Insurance Company, American Economy Insurance Company, Insurance Company of North America, Recovery Services International, Foremost Insurance Company, John Deere Insurance Company, Tahoe Insurance Company, Mutual of Enumclaw, National General Insurance Company, National Aviation Underwriters, Balboa Insurance Company, Millers Mutual Fire Insurance Company of Texas and Millers Casualty Insurance Company of Texas, Guarantee National Insurance Company, Farm Bureau Mutual Insurance Company of Idaho, Mid-America Fire and Marine Insurance Company, Allstate Insurance Company, Allstate Indemnity Company, United Pacific Insurance Company, Reliance Insurance Company, The Travelers Indemnity Company, The Travelers Indemnity Company of Rhode Island, The Charter Oak Insurance Company, North Pacific Insurance Company, Oregon Automobile Insurance Company, Universal Underwriters Insurance Company, Oregon Mutual Insurance Company, Centennial Insurance Company, Northwestern National Insurance Company, National Farmers Union Property and Casualty Company, Old Reliable Fire Insurance Company, Horace Mann Insurance Company, Aetna Insurance Company, Forrest Mutual Insurance Company, Great American Insurance Company, Automobile Club Insurance Company, American Fidelity Fire and Insurance Company, American Modern Home Insurance Company, Farmers Insurance Company of Idaho, Mid Century Insurance Company, Truck Insurance Exchange, Farmers Insurance Exchange, Industrial Indemnity Insurance Company, United States Fire Insurance Company, Nation Wide Insurance Company, Trans America Insurance Company, Unigard Insurance Company, Unigard Mutual Insurance Company, Emmco Insurance Company, American Hardware Mutual Insurance Company, Summit Home Insurance Company, Liberty Mutual Fire Insurance Company, Milbank Mutual Insurance Company, Safeco Insurance Company of America, General Insurance of America, Firemens Fund Insurance Company, National Surety Corporation, The American Insurance Company, West American Insurance Company, J. R. Rokeby-Johnson on behalf of Underwriters at Lloyds London; United States Fidelity and Guarantee Company, State Farm Mutual Automobile Insurance Company, State Farm Fire and Casualty Company, State Farm General Insurance Company, National Union Fire Insurance Company of Pittsburgh, Pennsylvania, Harco National Insurance Company, St. Paul Fire & Marine Insurance Company.

Parties also named as defendants in consolidated actions below are Morrison-Knudsen Company, Inc., Peter Kiewit Sons Co., Morrison-Knudsen-Kiewit, a joint venture, and McCabe Brothers, Inc.

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IN THE

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No. ———

AETNA INSURANCE COMPANY, et al.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS BELOW

The Opinion of the Ninth Circuit Court of Appeals was entered on August 14, 1980, and has been reported at 628 F.2d 1201 (9th Cir. 1980). (Appendix A). The Opinion of the United States District Court for the District of Idaho was entered on February 23, 1979, and is not reported. (Appendix B). The Order of Consolidation of the Idaho District Court making petitioners parties to this proceeding was entered on April 18, 1979, and is not reported. (Appendix C).

JURISDICTION

The judgment of the Ninth Circuit Court of Appeals was entered on August 14, 1980. (Appendix D). The Order of the Ninth Circuit Court of Appeals denying a timely petition for rehearing and rejecting the suggestion for rehearing en banc was entered on October 14, 1980. (Appendix E).

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

STATUTES AND REGULATIONS

The Mississippi River Flood Control Act of 1928, Chapter 569, Section 3, 45 Stat. 535, 33 U.S.C. § 702 (c) which provides:

> § 702c. *Same; expenditures for construction work; conditions precedent; liability for damage from flood waters; condemnation proceedings; floodage rights.*
>
> Except when authorized by the Secretary of the Army upon the recommendation of the Chief of Engineers, no money appropriated under authority of Sections 702a, 702b to 702d, 702e to 702g, 702h to 702j, 702k, 7021 and 702m of this title shall be expended on the construction of any item of the project until the States or levee districts have given assurances satisfactory to the Secretary of the Army that they will (a) maintain all flood-control works after their completion, except controlling and regulating spillway structures, including special relief levees; maintenance includes normally such matters as cutting grass, removal of weeds, local drainage, and minor repairs of main river levees; (b) agree

to accept land turned over to them under the provisions of section 702d of this title; (c) provide without cost to the United States, all rights of way for levee foundations and levees on the main stem of the Mississippi River between Cape Girardeau, Missouri, and the Head of Passes.

No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place: *Provided, however,* that if in carrying out the purposes of sections 702a, 702b to 702d, 702e to 702g, 702h to 702j, 702k, 7021, and 702m of this title it shall be found that upon any stretch of the banks of the Mississippi River it is impracticable to construct levees, either because such construction is not economically justified or because such construction would unreasonably restrict the flood channel, and lands in such stretch of the river are subjected to overflow and damage which are not now overflowed or damaged by reason of the construction of levees on the opposite banks of the river it shall be the duty of the Secretary of the Army and the Chief of Engineers to institute proceedings on behalf of the United States Government to acquire either the absolute ownership of the lands so subjected to overflow and damage or floodage rights over such lands.

The Flood Control Act of 1936, 33 U.S.C. §§ 701(c), 701(e). (Appendix F).

The Federal Tort Claims Act, 28 U.S.C. § 1346(b), and § 2680. (Appendix G).

The Teton Dam Authorization Act of 1964, Pub. L. 88-583, 78 Stat. 925, 43 U.S.C. §§ 616nn-616rr (now removed from the Code because of limited application). (Appendix H).

Teton Dam Disaster Assistance Act, Pub. L. 94-400, 90 Stat. 1211. (Appendix I).

The Act of December 11, 1944, Chapter 665, § 7, 58 Stat. 890, 33 U.S.C. § 709. (Appendix J).

33 C.F.R. § 208.11 (Appendix K).

41 Fed. Reg. 20, 400-20, 406 (May 18, 1976) (Appendix L).

STATEMENT OF THE CASE

In 1964, Congress authorized the construction of the Teton Dam as the principal feature of the Lower Teton Division of the Teton Basin Federal Reclamation Project, Pub. L. 88-583; 78 Stat. 925; 43 U.S.C. §§ 616nn-616rr. (Appendix H). The enabling legislation expressly set forth that the purposes of the project were irrigation, power, recreation and conservation. There is no mention in the authorizing legislation that Teton Dam would be constructed for the pupose of flood control.

Teton Dam failed on June 5, 1976, before the reservoir had been filled for the first time, causing the deaths of eleven (11) people and approximately $400,000,000 in property damage.

Subsequent to the failure, Congress enacted the Teton Dam Disaster Assistance Act of 1976, Pub. L. 94-400, 90 Stat. 1211 (Appendix I) which provided full compensation for the deaths, personal injuries and losses of property resulting from the Teton Dam failure. Although insurers were not entitled to receive compensation under the Teton Dam Disaster Assistance Act, that Act provided that an insurer with subrogation rights could pursue any right of action against the United States to which it may be entitled under any other laws.

On June 2, 1978, within two years after the failure of Teton Dam on June 5, 1976, each of the six petitioners filed its claim under the Federal Tort Claims Act with the United States, Department of the Interior, Bureau of Reclamation, Regional Office, at 550 West Fort Street, Boise, Idaho. On September 28, 1978, the United States Department of the Interior, Bureau of Reclamations finally denied each of the six claims. Within six months of that denial, on March 20, 1979, each of the six petitioners filed its respective complaint in the United States District Court for the District of Idaho. The complaints allege, among other things, that the negligence of the United States caused the failure of the Teton Dam and the damages which resulted.

Prior to March 20, 1979, other parties had filed actions against the United States of America in the Idaho District Court. Those actions were consolidated by the Idaho District Court by Order dated September 29, 1978. The United States filed its Motion to Dismiss those complaints based on immunity allegedly provided by 33 U.S.C. § 702(c) of the Mississippi River Flood Control Act of 1928. The Idaho District Court denied the United States' Motion to Dismiss by Order dated February 23, 1979. (Appendix B.) Subsequent to the filing of the Complaints of these six petitioners, the Idaho District Court ordered that these six claims as well as others be consolidated with the previously pending actions, by Order dated April 18, 1979. (Appendix C.) In its Consolidation Order of April 18, 1979, the district court further ordered that the court's Order denying the United States' Motion to Dismiss was deemed to have been filed in the newly

consolidated actions, and that the decision of the Ninth Circuit Court of Appeals on the appeal from the District Court's decision would govern the actions of the six petitioners. No discovery had been undertaken prior to the district court's ruling on the United States Motion to Dismiss. The record of this matter below contains only the allegations of one of the plaintiffs' complaints, which allegations were accepted as true for the purposes of ruling on the United States Motion to Dismiss. (Appendix B, page A-11.)

On August 14, 1980, the Ninth Circuit Court of Appeals held that the United States was immune under 33 U.S.C. § 702(c) from liability for its negligence in causing the failure of the Teton Dam and reversed the Order of the Idaho District Court, (Appendix A). A timely petition for rehearing and a suggestion of rehearing en banc was filed on behalf of all plaintiffs in the proceedings below, including the six petitioners, and was denied by the Ninth Circuit Court of Appeals on October 14, 1980. (Appendix E).

REASONS FOR GRANTING THE WRIT

I.

33 U.S.C. § 702(c) ONLY LIMITS THE LIABILITY OF THE UNITED STATES WITH RESPECT TO FLOOD CONTROL PROJECTS ON OR ALONG THE MISSISSIPPI RIVER.

In interpreting a statute, it is necessary to read the full text. *See, United States v. American Trucking Associations,* 310 U.S. 534, 542-544 (1940). In its decision, the Ninth Circuit repeated the same critical error which oth-

er courts granting the United States immunity under 33 U.S.C. § 702(c) have made: it selected three lines out of the two paragraphs comprising § 702(c) and set those three lines up as a separate "immunity" statute. When read in its entirety, § 702(c) only serves to limit the liability of the United States for damages resulting from flood control projects on the Mississippi River. In fact, the second paragraph of § 702(c) establishes that the United States has limited statutory liability for damages resulting from Mississippi River projects. See, 69 Cong. Rec. 8123 (Remarks of Rep. Reid commenting on § 702(c): "[T]his is the first time that any right has been recognized on the part of the individual owner against the Government for any flood-control damages."), see also, *Hurly v. Kincaid*, 285 U.S. 95, 102, n. 2 (1932); *United States v. Sponenbarger*, 308 U.S. 256, 269 (1939). On its face, § 702(c) does not grant the United States absolute immunity even with respect to Mississippi River projects. The Ninth Circuit's decision, however, affords the United States absolute immunity from liability for negligence in the design and construction of any dam anywhere in the country. The absurd effect of this decision is that the United States cannot be held liable for any damages resulting from its dam building activities except along the Mississippi River.

This Court previously recognized the importance of the Mississippi River Flood Control Act of 1928, of which § 702(c) is a part, in granting certiorari to review questions concerning that legislation in *United States v. Sponenbarger*, 308 U.S. at 260. It was important then for this Court to consider the legislation as it applied to activities on the Mississippi River. It is even more important now

for this Court to determine whether § 702(c) may properly be applied as an immunity statute having nationwide scope.

In *National Manufacturing Company v. United States*, 210 F.2d 263 (8th Cir. 1954), *cert. denied*, 347 U.S. 967 (1954), the Eighth Circuit first interpreted § 702(c) as providing immunity to the United States for damages resulting from activities other than flood control projects along the Mississippi River. For the first time, a court selected only the first three lines of the second paragraph of § 702(c), and relying on those three lines alone found a congressional intent to protect the United States from liability for flood damages at any place in the country. The Eighth Circuit failed, however, to read all of the language of § 702(c) and failed to consider provisions in subsequent flood control legislation which also pertained to the protection of the United States from liability for flood damages. As a result, the Eighth Circuit misconstrued the purpose and scope of § 702(c). Its erroneous conclusions have been followed by other circuits without any further analysis. *See, Clark v. United States*, 218 F. 2d 446 (9th Cir. 1954); *Lenoir v. Porters Creek Watershed Dist.*, 586 F.2d 1081 (6th Cir. 1978); *Callaway v. United States*, 568 F.2d 684 (10th Cir. 1978); and *Lunsford v. United States*, 570 F.2d 221 (8th Cir. 1977).

In *National Manufacturing*, the Eighth Circuit stated that the Flood Control Act of 1936 adopted § 702(c) of the Mississippi River Flood Control Act of 1928, thus extending the application of § 702(c) to projects other than those on the Mississippi River. The Eighth Circuit reasoned as follows:

> Congress also affirmed the application to the 1936 Act of the general provisions of the 1928 Act including § 3 [§ 702(c)] by providing, Sec. 8, that:
>
> > Nothing in this Act shall be construed as repealing or amending any provisions of the Act entitled 'An Act for the control of floods on the Mississippi River and its tributaries, and for other purposes', approved May 15, 1928, or any provision of any law amendatory thereof: 33 U.S.C.A. § 701(e).
>
> 210 F.2d at 270.

The language quoted indicates only that the 1936 Act did not repeal the 1928 Act. There is nothing in the 1936 Act, or its legislative history, to indicate that Congress intended that § 702(c) was to be included as a part of the 1936 Act, or to be made applicable to flood control projects authorized by the 1936 Act.

A review of the legislative history of Section 8 of the 1936 Act demonstrates that Congress intended to express not the incorporation of any provision of the 1928 Act, but rather to dispel any implication that the 1936 Act repealed in any way the 1928 legislation relating to the Mississippi River. Section 8 of the 1936 Act was apparently an amendment proposed by a Senate committee. 80 Cong. Rec. 7600. There is scant reference to Section 8 throughout the entire legislative history. In the Conference Report issued shortly before passage of the Act, however, Section 8 is referred to by the title "No Application to Mississippi River" and is explained in the following words: "Section 8 provides that the Bill in no way deals with the Mississippi River or amends

any laws respecting it." 80 Cong. Rec. 8852. Congress meant to ensure, by Section 8 of the 1936 Act, that work undertaken pursuant to the 1928 Act would not be suspended, or deemed unauthorized, merely by the passage of new flood control legislation affecting other parts of the country.

Moreover, in Section 3 of the Flood Control Act of 1936 (codified at 33 U.S.C. § 701(c)), Congress provided for the ". . . protection of the United States from liability for damages; . . . ." Had Congress intended that the first three lines of the second paragraph of § 702(c) would be applicable to activities authorized by the 1936 Act, it certainly could have, and would have, included such language in § 701(c).

Having wrenched § 702(c) out of context, and having inserted it into the 1936 Flood Control Act contrary to the express language of that statute, the Eighth Circuit still had to deal with the fact that § 702(c) was part of a statute relating to Mississippi River projects and codified under the heading "Mississippi River". *National Manufacturing*, 210 F.2d at 274. Rather than give meaning to the words Congress chose to use in the statute, the Eighth Circuit stated that the use of the words "Mississippi River" in the title of § 702(c) should not limit the application of that section. In support of this proposition the Eighth Circuit cited this Court's decisions in *Stephan v. United States*, 319 U.S. 423 (1943) and *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950). Both of these cases, however, state only that where there is a conflict between the language used in recording legislation in the Statutes at Large and in the United States Code, the Statutes at Large will take precedence. With respect to

§ 702(c) of Title 33, there is no inconsistency in the language used in the Statutes at Large and in the Code. Moreover, in *Stephan v. United States,* this Court was considering whether a code provision had any continuing validity solely because it was still printed, notwithstanding the fact that it had been specifically repealed by later legislation. Logically, this Court held that the mere printing of a repealed piece of legislation was not sufficient to obviate the fact that it had been repealed.

In deference to *National Manufacturing* and subsequent cases, the Ninth Circuit would not give fresh consideration to whether § 702(c) applied only to Mississippi River flood control projects. It stated:

> After years of consistent interpretation, it would be the proper function of Congress and not this court to narrow the scope of the immunity. (Appendix A, page A-5).

Avoiding that issue was inappropriate for at least three reasons:

(1) Even if Congress had been silent, it would not be a sufficient reason to justify the Ninth Circuit's failure to consider an issue based on judicial interpretation;

(2) There have not been years of "consistent interpretation" of § 702(c);

(3) Congress has narrowed the scope of sovereign immunity.

These reasons are considered below.

First, the mere fact that Congress may not have responded specifically to particular decisions should not be interpreted as approval of such decisions or as a sufficient

reason for not examining a particular statute. Even if it were true that Congress has been silent, this Court has cautioned that "[i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law." *Girouard v. United States*, 328 U.S. 61, 69 (1946); *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 241 (1970). Moreover, Congress has not been silent for any period of time after a definitive decision by *this Court* regarding the purpose and scope of § 702(c). The only decisions on this issue have been rendered by circuit courts of appeals. The lack of specific congressional response to those decisions should not be construed, without more, as congressional acknowledgement of the correctness of those decisions. There is simply no evidence in this record that supposed congressional inactivity should be taken as acceptance of the decisions of the circuit courts of appeals. *See, Helvering v. Hallock*, 309 U.S. 106 ,119-121 (1940).

Secondly, contrary to the Ninth Circuit's opinion, there have not been years of consistent interpretation of § 702 (c). The district and appellate courts which have considered this issue have provided no independent interpretation or analysis of § 702(c) but have rather accepted without question the interpretation of § 702(c) given by the Eighth Circuit in *National Manufacturing* in 1954. The only full consideration of the purpose and scope of § 702(c) appears in Judge Friendly's opinion for the Special Court provided under the Regional Rail Reorganization Act, in *In Re Penn Central Transportation Company*, 384 F. Supp. 895 at 944-946, n. 101 and accompanying text (1974). Although Judge Friendly's analysis of §702(c) was in the context of considering and deciding other is-

sues and does not indicate an express conflict among the circuits, his interpretation of the purpose and scope of § 702(c) differs substantially from that set forth in *National Manufacturing* and cases following it. After reviewing all of § 702(c), rather than just three lines ,and considering the legislative history of the Section, Judge Friendly stated:

> "There was a general consensus in Congress that property owners whose land was actually damaged as a result of the Project should be compensated for the value of what was taken, but a corresponding fear that, under the bill as passed by the Senate and as introduced in the House, the Government might be held liable for immense amounts of flood damage in the future even though this did not result from the reallocation of flood waters by the Project, and the 'no liability' clause was inserted *only* to protect against this." (Emphasis supplied) 384 F.Supp. at 946.

Properly construed, § 702(c) does not have nationwide application. As recognized by Judge Friendly, the first three lines of the second paragraph of § 702(c) were included only to protect the United States from liability for flood damages which did *not* result from the reallocation of flood waters pursuant to the Mississippi River flood control project. What the Ninth Circuit has referred to as "consistent interpretation" is in reality the adoption of the initial misinterpretation of § 702(c) by the Eighth Circuit in *National Manufacturing*.

Thirdly, Congress expressly waived the immunity of the United States from liability for injury or loss of property caused by governmental negligence in the Federal Tort

Claims Act, 28 U.S.C. § 1346(b) (FTCA). The FTCA and § 702(c) are compatible. Both subject the government to liability: the FTCA makes the United States liable for its negligence throughout the country; § 702(c) establishes a limited statutory liability with respect to the government's flood control activities on the Mississippi River.

In using § 702(c) to abrogate the waiver of immunity expressed in the FTCA with respect to governmental negligence in building dams, the Ninth Circuit's decision is contrary to this Court's recognition in *Indian Towing Company v. United States*, 350 U.S. 61, 69 (1955), that this Court, and presumably the lower courts, should not ". . . import immunity back into a statute designed to limit it."

The waiver of immunity for governmental negligence expressed in the FTCA is broad and unqualified. This waiver includes the negligence of the United States in causing the failure of reclamation dams in the arid West, and even with respect to flood control projects. Several Congressional Reports regarding the discretionary function exception to the FTCA, 28 U.S.C. § 2680(a), support this position. In those reports it is stated:

> "This is a highly important exception, intended to preclude any possibility that the Bill might be construed to authorize suit for damages against the government growing out of an authorized activity, *such as flood control or irrigation projects, where no negligence on the part of any government agent is shown* and the only ground for suit is the contention that the same conduct by a private individual would be tortious, or that the statute or regulation authorizing the project was invalid." H.R. Rep. No. 2245, 77th Cong. 2nd Sess. at 10 (1942); S. Rep.

> No. 1196, 77th Cong., 2nd Sess. at 7 (1942); H.R. Rep. No. 1287, 79th Cong., 1st Sess. at 5-6 (1945), quoted in *Dalehite v. United States,* 346 U.S. 15, 29 n. 21 (1953). (Emphasis supplied)

The Ninth Circuit found the portion of legislative history of the FTCA set forth above to be equivocal and stated that Congress should have expressly manifested an intent to include within the scope of the FTCA actions for flood damage arising from the United States' negligence. (Appendix A, page A-7). In *Blessing v. United States,* 447 F.Supp. 1160 (E.D. Penn. 1978), the District Court did not have the same problems in construing the effect of § 2680(a). It stated directly:

> Thus, § 2680(a) was aimed at precluding suit for damages suffered from, for example, flooding caused by water backed up behind a new dam, when the suit would be based only on effects naturally flowing from the decision to implement the project, whether the decision be made by statute, regulation, or exercise of discretion. If an individual suffered property damage not because too much sand was negligently mixed into the concrete used in constructing the dam, resulting in the dam crumbling and his land being flooded, but simply because the dam was constructed at all, his injury would be the result of policy decisions...
>
> 447 F.Supp. at 1170, n. 14.

The Teton Dam Disaster Assistance Act of 1976 demonstrates that Congress did not feel that it was immune from liability for the failure of the Teton Dam. Congress recognized an obligation to compensate those damaged by the failure of Teton Dam. While it did

not state its reasons for not allowing insurers to recover under that Act, whatever those reasons may have been, they were not the same as those for which § 702(c) was enacted. § 702(c) was enacted to limit the financial exposure of the United States in attempting to eliminate or reduce the catastrophic effect of floods on the Mississippi River. See, 69 Cong. Rec. 7022-7031. In the Teton Dam Disaster Assistance Act, Congress excluded insurers, but clearly not for the purpose of limiting its exposure. The appropriations bill authorized payments of approximately four hundred (400) million dollars. Claims presently pending in this proceeding are less than twelve (12) million dollars. Moreover, Congress contemplated litigation by the insurers by providing in the Assistance Act that insurers may pursue remedies under other laws.

The Ninth Circuit's decision injects confusion and uncertainty into this nation's laws regarding the reach of sovereign immunity. The effect of the decision will be most severely pronounced in the 17 arid western states, where the United States Bureau of Reclamation (recently renamed Water and Power Resources Service) has constructed hundreds of dams since 1902, not to prevent catastrophic floods, but to reclaim arid lands. *See*, 43 U.S.C. § 371; [1978] U.S. Code Cong. & Ad. News 5543. If allowed to stand, the Ninth Circuit's decision will make the United States unaccountable for hundreds of reclamation dams already constructed in the West, and unanswerable for any future reclamation projects. The United States will be able to build a dam anywhere, for any purpose, without adhering to minimum standards of due care. Victims of such carelessness will be left only with the hope that a relief bill, subject to the vagaries

of the political process, will be passed. The decision disregards completely the very real potential for future failures of reclamation dams. *See*, Reclamation Safety of Dams Act of 1978, P.L. 95-578, 92 Stat. 2471; [1978] U.S Code Cong. & Ad. News, 5542-5549.

In perpetuating the unfounded view that § 702(c) is an immunity statute having nationwide application, the Ninth Circuit has contradicted the congressional intent underlying the FTCA and § 702(c), as well as this court's decisions regarding the proper construction of statutes waiving immunity, and the appropriate deference to be given the lack of a specific congressional response to certain judicial decisions. It is therefore imperative that this Court decide now whether a provision of the Mississippi River Flood Control Act of 1928 may be taken out of its context and history to provide immunity to the United States for negligence in undertaking reclamation projects in the arid western states.

II.

33 U.S.C. § 702(c) ONLY LIMITS THE LIABILITY OF THE UNITED STATES FOR DAMAGES CAUSED BY "FLOODS OR FLOOD WATERS" RELATED TO PROJECTS WHICH CONGRESS HAS STATED ARE "FLOOD CONTROL" PROJECTS IN THE AUTHORIZING STATUTES.

Prior to the Ninth Circuit's decision, no Circuit Court of Appeals had ever granted the United States immunity under § 702(c) where the project involved had not been expressly designated as a flood control project in the authorizing legislation. The Ninth Circuit also departed from

the accepted and usual course of judicial proceedings in determining, without any factual finding or record, that the Teton disaster caused a flood or flood damage within the meaning of § 702(c).

Congress, in enacting § 702(c), did not intend to disclaim federal liability for every possible kind of water damage, but only for damage resulting from events properly described by the terms "floods or flood waters". See, *Guy F. Atkinson Co. v. Merritt, Chapman & Scott Corporation*, 126 F.Supp. 406, 408-409 (N.D. Cal.; 1954); *McClaskey v. United States*, 261 F.Supp. 912, 914 (D. Ore. 1966), aff'd 386 F.2d 807 (9th Cir. 1967). There is nothing in the record of this action which indicates that a "flood" occurred or that "flood waters" caused the damages being claimed. This is not a situation where government efforts to combat floods proved futile, but rather where the gross negligence of the United States Bureau of Reclamation caused a catastrophe to occur. In considering the United States' Motion to Dismiss, the allegations of the complaints must be accepted as being true. (Appendix B, page A-11). The present record reflects that this catastrophe would not have occurred had the negligent design and construction of the Teton Dam not taken place. To dismiss the petitioner's claims, as the Ninth Circuit has done, by stating without the benefit of a full factual record, that all water damage is caused in some part by natural conditions (i.e. rainfall) is an incredible departure from the usual course of judicial proceedings. (Appendix A, page A-6).

Every circuit court of appeals which has applied § 702 (c) has done so in matters involving projects where the language of the authorizing statute stated that the project

was for the purpose of flood control. The following list of cases, projects, authorizing statutes and express language identifying the purpose of flood control demonstrates the conflict between the Ninth Circuit's decision and that of other circuit courts of appeal:

> *Callaway v. United States*, 568 F.2d 684 (10th Cir. 1978); Waurika Dam and Reservoir, Pub. L. 88-253, 77 Stat. 840, 841 (1963); "control of destructive flood waters."
>
> *Florida East Coast Railway v. United States*, 519 F.2d 1184 (5th Cir. 1975); Central and Southern Florida Flood Control Project; Flood Control Act June 30, 1948, 62 Stat. 1175, 1176; "control of destructive flood waters."
>
> *McClaskey v. United States*, 386 F.2d 807 (9th Cir. 1967); Alkali Canyon Project; Flood Control Act of 1944, 58 Stat. 887, 902; "control of destructive flood waters and other purposes,," and the Alkali Canyon Project additionally "for local flood protection."
>
> *Stover v. United States*, 332 F.2d 204 (9th Cir.), *cert. denied*, 379 U.S. 922 (1964); Sacramento River Flood Control Project; Act of August 26, 1937, 50 Stat. 844, 849; authorizing construction of "Sacramento River Flood Control" project under direction of Secretary of War and supervision of Chief of Engineers
>
> *Clark v. United States*, 218 F.2d 446 (9th Cir. 1954); Peninsular Drainage District No. 2; Flood Control Act of June 22, 1936, 49 Stat. 1570, 1590; "flood control, and for other purposes."
>
> *National Manufacturing Co. v. United States*, 210 F. 2d 263 (8th Cir.), *cert. denied*, 347 U.S. 967 (1954); dam/levees along rivers in Kansas City;

> Flood Control Act of June 22, 1936, 49 Stat. 1570; "control of destructive flood waters and other purposes."

The Ninth Circuit recognized that § 702(c) had only been applied where flood damage resulted in connection with a project related to flood control. Not finding a flood control purpose in the authorizing statute, however, the Ninth Circuit selected references from the legislative history referring to flood control in order to invoke § 702 (c). (Appendix A, pages A-4; A-5).

In this respect the Ninth Circuit's decision is contrary to this Court's recognition in *United States v. American Trucking Associations, Inc.*, 310 U.S. at 543, that "[t]here is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." Rather than adhere to the language of the Teton Dam Authorization Act, the Ninth Circuit created a flood control purpose from selected statements in the legislative history. The Ninth Circuit ignored the approach to statutory interpretation suggested by Justice Jackson in a concurring opinion in *Schwegmann Bros. v. Calvert Distillers Corporation*, 341 U.S. 384, at 396 (1951):

> The Rules of the House and Senate, with the sanction of the Constitution, require three readings of an Act in each House before final enactment. That is intended, I take it, to make sure each House knows what it is passing and passes what it wants, and that what is enacted was formally reduced to writing. It is the business of Congress to sum up its own debates in its legislation. Moreover, it is only the words of the bill that have presidential approval, where that

> approval is given. It is not to be supposed that in signing a bill the President endorses the whole Congressional Record. For us to undertake to reconstruct an enactment from legislative history is merely to involve the Court in political controversies which are quite proper in the enactment of a bill but should have no place in its interpretation.

The Ninth Circuit has afforded immunity to the United States under § 702(c) despite the fact that the Teton Dam Authorization Act contained no specific reference to "flood control". Given the Ninth Circuit's decision, no citizen can rely on the words of any statute in pursuing or protecting his or her rights. One would have to review the entire legislative history of any legislation, and even assuming that one could do that, one would not, as Justice Jackson has remarked, have ". . . any way of anticipating what would impress enough members of the Court to be controlling." *Schwegmann*, 341 U.S. at 396.

The Ninth Circuit has also ignored other factors which demonstrate that the Teton Dam was not a flood control project. Teton Dam was authorized pursuant to Title 43 of the U.S. Code relating to reclamation laws, and not Title 33 relating to flood control. If Teton Dam had been considered a flood control project, it would have been subject to the regulations prescribed pursuant to 33 U.S.C. § 709 and would have been listed as one of those projects for which federal funds were provided for flood control pursuant to 33 C.F.R. § 208.11(e). (Appendix K, pages A-54-A-59); Teton Dam was not on the list of projects for which federal funds were provided for flood control. 41 Fed. Reg. 20, 400-406 (1976). (Appendix L). If Congress had intended Teton Dam to be a flood control

project, one would expect that it would have been treated as such. It did not receive such treatment because it was not a flood control project. As this Court has recognized in *United States v. Gerlach Live Stock Company*, 339 U.S. 725, 739 (1950), the manner in which Congress realistically treats a dam project bears directly on the purpose the judiciary should ascribe to the project.

There is no factual finding in the record of this proceeding that the damages resulting from the failure of the Teton Dam were caused by "floods or flood waters" within the meaning of § 702(c). Prior to the ruling of the Ninth Circuit, no other court had held that § 702(c) limited the liability of the United States unless Congress had expressed in the authorizing statute that the project in question had a "flood control" purpose. The Ninth Circuit's decision is a departure from the accepted and usual course of judicial proceedings and is in conflict with the decisions of other circuits. Its decision would permit the application of § 702(c) with respect to any governmental action involving water. That was neither the intent of § 702(c) nor the FTCA.

CONCLUSION

33 U.S.C. § 702(c) only limits the liability of the United States for damages caused by floods or flood waters with respect to flood control projects on or along the Mississippi River and its tributaries. In affording the United States immunity under § 702(c) for the failure of the Teton Dam, a reclamation dam in Eastern Idaho, the Ninth Circuit's decision contradicts the congressional intent to waive sovereign immunity for negligence, conflicts with prior circuit court of appeals' decisions applying

§ 702(c), and is contrary to previous decisions of this Court pertaining to statutory construction in general and the interpretation of immunity statutes in particular. If allowed to stand, the Ninth Circuit's decision will confuse the application of this nation's immunity laws and will allow the United States Bureau of Reclamation and other governmental agencies to engage in dam building projects throughout the country, particularly in the arid West, with flagrant disregard for the safety and well being of persons and property.

For all the foregoing reasons, this Court should grant the Petition for Certiorari.

Dated: January 7, 1981.

Respectfully submitted,

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Appendix A

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AETNA INSURANCE COMPANY, et al.,
Plaintiffs-Appellees,

vs.

UNITED STATES OF AMERICA,
Defendant-Appellant.

OPINION

No. 79-7219

(Submitted March 6, 1980)

[Entered August 14, 1980]

Appeal from the United States District Court for the District of Idaho

Before: TANG, SCHROEDER and POOLE, Circuit Judges

SCHROEDER, Circuit Judge:

This is an action by insurance companies against the United States Government to recover more than $7,000,000 in claims paid to insureds as a result of the 1976 collapse of the Teton Dam. The sole issue presented in this interlocutory appeal is whether the suit is barred by the provisions of 33 U.S.C. § 702c, which immunizes the United States from liability for flood damage related to

flood control projects. The district court certified this appeal from its order denying the Government's motion to dismiss. We accepted the appeal and now hold that the district court's order must be reversed because the United States is immune.

Congress authorized the construction of the Teton Dam in 1964 in the wake of serious flooding which occurred in 1962. The dam was part of the Bureau of Reclamation's Teton Basin Project authorized by Pub.L.No. 88-583, 78 Stat. 925 (1964), 43 U.S.C. § 616nn - 666rr.[1] The enabling legislation's preamble stated multiple purposes for the project which did not expressly include flood control. However, the legislative history of the Act makes it clear that the project was at least in part intended to prevent the type of floods which had occurred in 1962. The project came to a tragic end, however, on June 5, 1976, when the partially completed dam collapsed, causing severe flooding and great damage in Idaho's Teton Basin.

Congress responded by enacting the Teton Dam Disaster Assistance Act of 1976. Pub. L. No. 94-400, 90 Stat. 1211 (1976). The Act provided direct compensation to injured parties but expressly excluded claims of insurance carriers for reimbursement of claims paid to their insureds. *Id.*, § 3(d), 90 Stat. at 1211. The Act further provided that an insurer could exercise "any right of action against the United States to which it may be entitled under any other laws for payments made to [insureds] . . . ." *Id.*, § 3(f), 90 Stat. at 1212. *See also id.*, § 9(c), 90 Stat. at 1214.

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[1]The statute has since been removed from the United States Code as having limited applicability.

The plaintiff insurance companies in this case acknowledge that they have no claim under the Teton Dam Disaster Assistance Act, but they do claim entitlement to recovery against the Government under another law, namely the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2401(b), 2671 - 2680. They filed this action as subrogees of their insured's claims against the Government, alleging that the Government's design and construction of the dam was negligent and that the Government's negligence caused the dam's collapse.

The Government argues that the complaint should be dismissed because the United States is immune from liability under 33 U.S.C. § 702c, which provides:

> No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place. . . .

Despite the broad language of the immunity statute, it is by now well settled in this Circuit that the immunity statute applies only when the flood damage is caused by a project related to flood control, and that it does not apply when the flood damage is "wholly unrelated to any act of Congress authorizing expenditure of federal funds for flood control. . . ." *Peterson v. United States,* 367 F 2d 271, 275 (9th Cir. 1966 . *Accord Graci v. United States,* 456 F.2d 20 (5th Cir. 1971), *cert denied,* 412 U.S. 928 (1973). The question before us thus narrows to whether the flood damage here was related to government flood control activities so as to fall within the immunity provisions as they have been interpreted by the courts.

Flood control undisputably was not the exclusive purpose of the Teton Basin Project, and it may not have

been a major purpose. This Court has held, however, that damage as a result of flooding from a government project fell within the immunity provision of § 702c despite the fact that the project was not exclusively devoted to flood control. *McClaskey v. United States,* 386 F.2d 807 (9th Cir. 1967). Section 702c has frequently been applied to floods stemming from multipurpose projects. *E.g., Taylor v. United States,* 590 F.2d 263 (8th Cir. 1979); *Lenoir v. Porters Creek Watershed District,* 586 F.2d 1081 (6th Cir. 1978); *Callaway v. United States,* 568 F.2d 684 (10th Cir. 1978). Nor does it matter, as plaintiffs suggest, whether the projects are administered by the Corps of Engineers, *e.g., McClaskey v. United States, supra,* the Bureau of Reclamation *e.g., Sanborn v. United States* 453 F.Supp. 651 (E.D. Cal. 1977); *Hedrick v. United States,* 184 F.Supp. 927 (D.N.M. 1960), or the Department of Agriculture, *e.g., Lenoir v. Porters Creek Watershed District, supra.* The policy behind § 702c, was to permit the government to engage in a "vast construction program . . . of dikes, dams, levees, and related works," *Peterson, supra* at 275-76. That purpose would not be furthered by limiting the immunity to single purpose flood control projects, or even to projects in which flood control is a dominant goal.

The insurers assert, however, that flood control was not at all a purpose of the Teton Basin Project. They ask us to ignore the extensive legislative history indicating that flood control was very much on the minds of the members of Congress in passing the legislation. *See, e.g.,* H.R. Rep. No. 1715, 88th Cong., 2d Sess. at 3 (1964) ("The project would also provide substantial flood protection. . . ."); S.Rep. No. 1[illegible]7, 88th Cong., 2d Sess. at 3 (1964)

("The disastrous flood of February 1962 dramatically re-emphasized the need for the construction proposed."). The insurers would have us focus narrowly on the purposes listed in the preamble to the Act which, for some unexplained reason, omitted flood control. The insurers' position in this regard is, however, contrary to the approach which the courts have taken in focusing, not upon the language of the legislation authorizing projects, but upon whether the project was actually intended, at least in part, to control flooding. Flood control was beyond question a purpose of the Teton Basin Project. Indeed, this Court has specifically said in another context that one of the purposes of the Teton Basin Project was flood control. *Trout Unlimited v. Morton,* 509 F.2d 1276 (9th Cir. 1974).

The insurers also argue that § 702c, which was enacted in 1928 in connection with an extensive project to control flooding on the Mississippi River, was intended to apply only to projects on that river, and that the Teton Basin Project is therefore outside its scope. This argument has been raised and rejected many times, and every court consider the issue has held that § 702c has nationwide application. *E.g., Clark v. United States,* 218 F.2d 446 (9th Cir. 1954); *Lenoir v. Porters Creek Watershed Dist., supra,* at 1086; *National Mfg. Co. v. United States,* 210 F 263 (8th Cir.), *cert. denied,* 347 U.S. 967 (1954). After years of consistent interpretation, it would be the proper function of Congress and not this Court to narrow the scope of the immunity.

The insurers' remaining arguments focus not on the purpose of the Teton Basin Project but on the nature of the disaster which occurred. The insurers contend that the

collapse of the dam with its ensuing flood damage was caused solely by government negligence unaccompanied by any unusual natural factors, and that 702c should not bar recovery in those circumstances Its principal support for that position is dictum in *Stover v. United States,* 204 F.Supp. 477 (N.D. Cal. 1962), *aff'd,* 332 F.2d 204 (9th Cir.), *cert. denied,* 379 U.S. 922 (1964). In this Court's affirmance, however, we expressly disapproved the trial court's dictum that 702(c) would not apply to floods caused by negligence. The dictum has also been disapproved in other decisions. *See Burlison v. United States,* No. 79-2023, slip op. 8th Cir. July 11, 1980); *Lunsford v. United States,* 570 F.2d 221 (8th Cir. 1977); *Florida East Coast Railway Co. v. United States,* 519 F.2d 1184 (5th Cir. 1975); *Sanborn v. United States,* 453 F.Supp. 651 (E.D. Cal. 1977). Any flood caused by government negligence is also caused in part by the natural conditions extant at the time of the negligence: e.g., the amount of rainfall which preceded the flood and hence the amount of water being stored. To attempt to distinguish between ordinary and unusual natural conditions, as plaintiffs urge, would be a very difficult task. Such an inquiry would necessarily frustrate section 702c's purpose of permitting the government to engage in flood control without fear of liability. We agree with the Eighth Circuit that such a test would "lead the court into the morass of "contributing causes, 'superseding causes,' and 'intervening causes.' " *Lunsford, supra* at 228 n. 13, quoting *Lunsford v. United States,* 418 F.Supp. 1045, 1054 (D.S.D. 1976). For similar reasons we reject the insurers' contention that the Teton Dam Disaster was not a "flood" within the meaning of 702c. The immunity provision is not limited

to water damage attributable to a natural disaster. *See Florida East Coast Railway Co. v. United States, supra.*

Plaintiffs also argue that since at the time the immunity statute was passed, some twenty years before the Federal Tort Claims Act, there was no governmental liability for negligence, the immunity statute could not have been intended to provide immunity for negligent conduct in connection with flooding. An equally compelling argument can be made, however, that given the existing broad language of the immunity provision, Congress in passing the Federal Tort Claims Act should have manifested an intent to include flood damage arising out of negligence within the scope of the Federal Tort Claims Act. The legislative history is at best equivocal[2] and the matter has been resolved for our purposes by repeated decisions of this Court which have held that 702c bars suits based on negligence. *McClaskey v. United States, supra; Stover v. United States, supra; Clark v. United States, supra.*

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[2]Plaintiffs rely on an explanation of the discretionary function exception to the Federal Tort Claims Act, 28 U.S. C. § 2680(a), contained in several of the Congressional reports on the Federal Tort Claims Act. the relevant sentence is as follows:

> This is a highly important exception, intended to preclude any possibility that the bill might be construed to authorize suit for damages against the Government growing out of an authorized activity, such as flood-control or irrigation project, where no negligence on the part of any Government agent is shown, and the only ground for suit is the contention that the same conduct by a private individual would be tortious, or that the statute or regulation authorizing the project was invalid.

H.R. Rep. No. 2245, 77th Cong., 2d Sess. at 10 (1942); S. Rep. No. 1196, 77th Cong., 2d Sess. at 7 (1942); H.R. Rep. No. 1287, 79th Cong., 1st Sess. at 5-6 (1946), quoted in *Dalehite v. United States*, 346 U.S. 15, 29 n.21 (1953).

While this sentence does suggest that the Government may be liable for flood damage due to government negligence, it is merely an example, one of several in the paragraph, of the way in which the discretionary function exception is to operate. It does not expressly recognize the specific flood immunity of 33 U.S.C. § 702c.

The order of the district court is reversed and the cause is remanded with instructions to grant the Government's motion to dismiss.

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

AETNA INSURANCE COMPANY, a corporation,
Plaintiff,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

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and consolidated cases

ORDER

Civil Nos. 78-4031, et al

[Entered February 23, 1979]

The Court, having reviewed the materials of record and having received oral argument, finds no basis in fact or law which brings this matter within the scope of 33 U.S.C. §702c.

NOW, THEREFORE, IT IS HEREBY ORDERED that defendant's motion to dismiss pursuant to Rule 12 (b) of the Federal Rules of Civil Procedure be, and the same is hereby, DENIED.

IT IS FURTHER ORDERED that this matter be, and the same is hereby, certified for appeal pursuant to 28 U.S.C. § 1292(b).

DATED this 23rd day of February, 1979.

/s/ MARION J. CALLISTER
United States District Judge

MEMORANDUM DECISION

Civil Nos. 78-4031, et al

All materials of record having been filed and reviewed and this matter having come regularly before the Court on February 12, 1979, for hearing on defendant's motion to dismiss pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, it is the conclusion of the Court that defendant's motion to dismiss should be denied.

STATEMENT OF THE CASE

The failure of the Teton Dam on June 5, 1976, resulted in hundreds of millions of dollars of damage to the property of individuals and businesses in eastern Idaho. Plaintiffs are insurance companies whose insureds' property was among that damaged. Pursuant to insurance policies between them and their insureds, plaintiffs have reimbursed their insureds for the losses that the latter suffered as a result of the Teton Dam disaster.

Congress responded to the Teton Dam failure by enacting the Teton Dam Disaster Assistance Act of 1976, Pub. L. No. 94-400, 90 Stat. 1211, which recites the Government's purpose to compensate fully all deaths, personal

injuries, and losses of property arising from the failure of the dam. Insurance companies, however, are explicitly excepted from recovery under the Act for the payments they have made to their insureds. The Act provides, however, that an insurance company can still exercise "any right of action against the United States to which it may be entitled under any other laws" for payments made to its insureds. Pub. L. No. 94-400, § 3(f), 90 Stat. at 1212.

Accordingly, plaintiffs instituted these suits pursuant to the Federal Tort Claims Act of June 25, 1948, 62 Stat. 982, 28 U.S.C. §§ 1346(b), 2671 *et seq.*, as amended. The United States of America responded to plaintiffs' suits in cases numbered 78-4031, 78-4032, and 78-4033 by filing its Rule 12(b) motion to dismiss, based upon the grounds that the court lacks jurisdiction over the subject matter of the action and that the complaints of the plaintiffs fail to state a claim upon which relief can be granted.

STATEMENT OF THE ISSUES

Defendant's motion to dismiss is grounded specifically upon the argument that plaintiffs' actions are barred by the provisions of Section 3 of the Flood Control Act of 1928, as codified at 33 U.S.C. § 702c, which provides in pertinent part:

> No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place. . . .

The major issue before the Court is whether Section 702c immunity applies to the Teton Dam failure in the

absence of any Congressional action designating the Teton Basin Project a flood control project.

DISCUSSION

Inasmuch as defendants have filed a motion to dismiss, the allegations of the plaintiffs' complaints must be taken as true for the purposes of the motion, *Miree v. DeKalb County*, 433 U.S. 25, 27 n.2 (1977), whether it be a motion to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction, *Walling v. Beverly Enterprises Corp.*, 476 F.2d 393, 395-96 (9th Cir. 1973), or under Rule 12(b)(6) for failure to state a claim upon which relief can be granted, *California Dump Truck Owners Ass'n v. Associated General Contractors of America*, 562 F.2d 607, 614 (9th Cir. 1977).

The Teton Dam Authorization Act of September 7, 1964, Pub. L. 88-583, contains no reference to flood control, either as published at 78 Stat. 925 or 43 U.S.C. §§ 616nn through 616rr. In the first sentence of that Act, Congress explicitly provided all the purposes of the Act, and declared in full:

> In order [1] to assist in the *irrigation* of arid and semiarid lands in the upper Snake River Valley, Idaho, [2] to provide facilities for river *power* opportunities created thereby and, as incidents to the foregoing purposes, [3] to enhance *recreational* opportunities and [4] provide for the *conservation* and development of fish and wildlife, the Secretary of the Interior is authorized to construct, operate, and maintain the Lower Teton division of the Teton Basin Federal reclamation project. 43 U.S.C. § 616nn (emphasis added).

A review of federal case law reveals that Section 702c immunity does not apply to damages "unconnected with flood control projects," *Graci v. United States*, 456 F.2d 20, 27 (5th Cir. 1971) or "wholly unrelated to any Act of Congress authorizing expenditures of federal funds for flood control." *Peterson v. United States*, 367 F.2d 271, 275 (9th Cir. 1966). Whenever a federal court has applied Section 702c, the project at issue was Congessionally designated a flood control project supervised by the Army Corps of Engineers. Despite the absence of flood control language in the authorization statute and the fact that Congress designated the Teton Basin Project a reclamation project and has not appropriated any federal funds specifically for flood control under the Authorization Act, the Government attempts to avail itself of Section 702c immunity by asking the Court to look to the preenactment legislative history where flood control was listed among the Project's purposes and insert flood control as a purpose in the Teton Dam Authorization Act. H. Rept. No. 1715, 88th Cong., 2d Sess., at 3 (1964). The Court finds the language of the Act to be clear and unambiguous in its statement of purposes. Moreover, a judicial insertion of flood control into the Authorization Act would not convert a reclamation project into a flood control project. The Court is not inclined to insert language used in the preliminary legislative stages which was ultimately omitted from a bill in its approved and signed form. *Marshall Field & Co., v. Clark*, 143 U.S. 649 (1892).

Inasmuch as Congress designated the Teton Basin Project a reclamation project rather than a flood control pro-

ject and flood control was not enumerated among the purposes of the Project, the Court must look for other reasons for applying Section 702c immunity to the Teton Dam disaster. There is no evidence before the Court that Congress expressly appropriated funds for flood control. Pub. L. No. 93-393, 88 Stat. 785, Peterson v. United States, supra, at 275. There is no evidence before the Court that the Army Corps of Engineers supervised the Teton Basin Project or expended Congressionally appropriated funds for flood control on the Project. *Id.* And finally, there is no evidence before the Court that the alleged negligent conduct of the defendant through its agents was the result of any effort to control flooding at the time of disaster.

In the absence of (1) Congressional flood control designation, (2) any express flood control purpose stated in the Authorization Act, (3) any Congressional flood control appropriation (4) any expenditures or supervision by the Army Corps of Engineers, and (5) evidence that the water damage resulted from allegedly negligent conduct aimed at controlling flood waters on June 5, 1976, the Court finds no basis for Section 702c in order to bar defendant's potential liability. Had one of the above conditions been present, the Court may have reached a different result.

There are substantial arguments on each side of the question concerning the scope of application of Section 702c without any clear and controlling decisions by either the Ninth Circuit Court of Appeals or the United States Supreme Court. If the defendant were successful in appealing this decision, it would completely terminate all 35 actions consolidated before the Court in this matter.

Therefore, it appears to the Court that this is a proper case to be certified for appeal pursuant to 28 U.S.C. § 1292(b).

DATED this 23rd day of February, 1979.

/s/ MARION J. CALLISTER
United States District Judge

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

AETNA INSURANCE COMPANY, a corporation,
Plaintiff,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

Civil No. 78-4031

and consolidated cases

Civil No. 79-4020

INSURANCE COMPANY OF NORTH AMERICAN, a corporation; RECOVERY SERVICES INTERNATIONAL, a corporation,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

Civil No. 79-4021

GUARANTY NATIONAL INSURANCE COMPANY, a corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Civil No. 79-4024

APPALACHIAN INSURANCE COMPANY,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Civil No. 79-4025

AMERICAN MUTUAL REINSURANCE COMPANY,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Civil No. 79-4026

PROTECTION MUTUAL INSURANCE COMPANY,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

Civil No. 79-4027

CANNERS EXCHANGE SUBSCRIBERS,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

Civil No. 79-4028

CLEARFIELD INSURANCE, LTD.,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

Civil No. 79-4029

WARNERS RECIPROCAL INSURERS,
Plaintiff.

vs.

UNITED STATES OF AMERICA,
Defendant.

Civil No. 79-4032

WEST AMERICAN INSURANCE COMPANY, a Corporation; J.R. ROKEBY-JOHNSON on behalf of those Underwriters at LLOYD'S, LONDON, and British Companies signatory to Policy No. 3066021, J.R. ROKEBY-JOHNSON on behalf of those Underwriters at LLOYD'S, LONDON and British Companies signatory to Policy No. 5871026, and UNITED STATES FIDELITY and GUARANTY COMPANY, a corporation,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

Civil No. 79-4035

GLOBAL AVIATION INSURANCE MANAGERS AND BROKERS, INC., a corporation,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

Civil No. 79-4036

SENTRY INSURANCE A MUTUAL COMPANY, a corporation,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

Civil No. 79-4037

H. R. ROKEBY-JOHNSON, as Representative of those Underwriters at Lloyds, London, Signatory to Policy Nos. JGQ 0205 and JGA 0090, 52561/RC,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

Civil No. 79-4038

PREFERRED RISK MUTUAL INSURANCE COMPANY, a corporation,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

Civil No. 79-4039

FEDERAL INSURANCE COMPANY, a corporation,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

Civil No. 79-4040

AETNA LIFE AND CASUALTY, a Connecticut corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

ORDER OF CONSOLIDATION

IT IS ORDERED that the above-entitled actions be, and the same are hereby, consolidated with Case No. 78-4031 for the purpose of discovery and determination of liability issue. The motion to dismiss heretofore filed by the defendant in Case No. 78-4031 shall be deemed to have been filed in these actions;

IT IS FURTHER ORDERED that the defense raised by plaintiffs in the above-entitled actions against defendant's motion to dismiss that 33 U.S.C. 702c applies only to the Mississippi River and not to other rivers in the United States be, and the same is hereby, deemed raised in Case No. 78-4031 and deemed without merit.

IT IS FURTHER ORDERED that the Court's order denying defendant's motion to dismiss in Case No. 78-4031 shall be deemed to have been filed in these actions, and that the notice of appeal from said order of denial in Case No. 78-4031 shall be deemed to have been filed in these actions and all further actions and the decision by the Ninth Circuit Court of Appeals in the pending appeal in Case No. 78-4031 shall govern these actions.

DATED this 18th day of April, 1979.

/s/ MARION J. CALLISTER
United States District Judge

Appendix D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AETNA INSURANCE COMPANY, et al.,
Plaintiffs-Appellees,

vs.

UNITED STATES OF AMERICA,
Defendant-Appellant.

No. 79-7219

DC CV 78-4031, et al., MJC

APPEAL from the United States District Court for the District of IDAHO (Boise)

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of IDAHO (Boise) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and remanded, with instructions.

Costs in this court in favor of the appellant and against the appellees.

Costs:	
BRIEF FOR THE APPELLEES	$47.50
TOTAL	$47.50

Filed and entered August 14, 1980

RICHARD H. DEANE
Clerk of Court
By: /s/ OSCAR TAGLE
Deputy Clerk

Appendix E

ORDER

No. 79-7219

[Entered October 14, 1980]

Before: TANG, SCHROEDER and POOLE, Circuit Judges

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Appendix F

FLOOD CONTROL

§ 701c. *Rights-of-way, easements, etc; acquisition by local authorities; maintenance and operation; protection of United States from liability for*

damages; requisites to run-off and water-flow retardation and soil erosion prevention assistance

After June 22, 1936, no money appropriated under authority of section 701f of this title shall be expended on the construction of any project until States, political subdivisions thereof, or other responsible local agencies have given assurances satisfactory to the Secretary of the Army that they will (a) provide without cost to the United States all lands, easements, and rights-of-way necessary for the construction of the project, except as otherwise provided herein; (b) hold and save the United States free from damages due to the construction works; (c) maintain and operate all the works after completion in accordance with regulations prescribed by the Secretary of the Army: *Provided*, That the construction of any dam authorized by section 5 of the Act of June 22, 1936, c. 688, 49 Stat. 1572, may be undertaken without delay when the dam site has been acquired and the assurances prescribed herein have been furnished, without awaiting the acquisition of the easements and rights-of-way required for the reservoir area: *And provided further*, That whenever expenditures for lands, easements, and rights-of-way by States, political subdivisions thereof, or responsible local agencies for any individual project or useful part thereof shall have exceeded the present estimated construction cost therefor, the local agency concerned may be reimbursed one-half of its excess expenditures over said estimated construction cost: *And provided further*, That when benefits of any project or useful part thereof accrue to lands and property outside of the State in which said proj-

ect or part thereof is located, the Secretary of the Army with the consent of the State wherein the same are located may acquire the necessary lands, easements, and rights-of-way for said project or part thereof after he has received from the States, political subdivisions thereof, or responsible local agencies benefited the present estimated cost of said lands, easements, and rights-of-way, less one-half the amount by which the estimated cost of these lands, easements, and rights-of-way exceeds the estimated construction cost corresponding thereto: *And provided further,* That the Secretary of the Army shall determine the proportion of the present estimated cost of said lands, easements, and rights-of-way what each State, political subdivision thereof, or responsible local agency should contribute in consideration for the benefits to be received by such agencies: *And provided further,* That whenever not less than 75 per centum of the benefits as estimated by the Secretary of the Army of any project or useful part thereof accrue to lands and property outside of the State in which said project or part thereof is located, provision (c) of this section shall not apply thereto; nothing herein shall impair or abridge the powers now existing in the Department of the Army with respect to navigable streams: *And provided further,* That nothing herein shall be construed to interfere with the completion of any reservoir or flood control work authorized by the Congress and now under way.

(d) As a condition to the extending of any benefits, in prosecuting measures for run-off and water-flow retardation and soil erosion prevention authorized by Act of Congress pursuant to the policy declared in section 701a

of this title, to any lands not owned or controlled by the United States or any of its agencies, the Secretary of Agriculture may, insofar as he may deem necessary for the purposes of such Acts, require—

(1) The enactment and reasonable safeguards for the enforcement of State and local laws imposing suitable permanent restrictions on the use of such lands and otherwise providing for run-off and water-flow retardation and soil-erosion prevention:

(2) Agreements or covenants as to the permanent use of such lands; and

(3) Contributions in money, services, materials, or otherwise to any operations conferring such benefits.

June 22, 1936, c. 688, § 3, 49 Stat. 1571; Aug. 28, 1937, c.877, § 4,50 Stat. 877.

* * *

§ 701e. *Effect of Act June 22, 1936 on provisions for Mississippi River and other projects*

Nothing in sections 701a, 701b, 701c, 701d to 701f, and 701h of this title and sections 5 to 7 of the Act of June 22, 1936, ch. 688, 49 Stat. 1572-1596, shall be construed as repealing or amending any provision of sections 702a, 702b to 702d, 702e to 702g, 702h to 702j, 702k, 7021, 702m and 704 of this title. The authority conferred by sections 701a, 701b, 701c, 701d to 701f, and 701h of this title and sections 5 to 7 of Act June 22, 1936, ch. 688, 49 Stat. 1752-1596, and any funds appropriated pursuant thereto for expenditure are supplemental to all

other authority and appropriations relating to the departments or agencies concerned, and nothing in said sections shall be construed to limit or retard any department or agency in carrying out similar and related activities heretofore or hereafter authorized, or to limit the exercise of powers conferred on any department or agency by other provisions of law is[1] carrying out similar and related activities.

June 22 ,1936, c. 688, § 8, 49 Stat. 1596.

* * *

[1]So in original. Probably should read "in".

Appendix G

§ 1346. *United States as defendant*

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for

liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of any civil action or claim for a pension.

(e) The district courts shall have original jurisdiction of any civil action against the United States provided in section 7426 of the Internal Revenue Code of 1954.

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

June 25, 1948, c. 646, 62 Stat. 933; Apr. 25, 1949, c. 92, § 2(a), 63 Stat. 62; May 24, 1949, c. 139, § 80(a), (b), 63 Stat. 101; Oct. 31, 1951. c. 655, § 50(b), 65 Stat. 727; July 30, 1954, c. 648, § 1, 68 Stat. 589; July 7, 1958, Pub. L. 85-508, § 12(e), 72 Stat. 348: Aug. 30, 1964. Pub.L. 88-519, 78 Stat. 699: Nov. 2, 1966, Pub.L. 89-719, Title II, § 202(a), 80 Stat. 1148: July 23 ,1970, Pub.L. 91-350, § 1(a), 84 Stat. 449: Oct. 25, 1972, Pub.L. 92-562, § 1. 86 Stat. 1176.

* * *

§ 2680. *Exceptions*

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 711-752, 781, 790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Repealed. Sept. 26, 1950, c. 1049, § 13(5), 64 Stat. 1043.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

June 25, 1948, c. 616, 62 Stat. 984; July 16, 1949, c. 340, 63 Stat. 444; Sept. 26, 1950, c. 1049, §§ 2(a)(2), 13(5), 64 Stat. 1038, 1043; Aug. 18, 1959, Pub.L. 86 168, Title II, § 202(b), 73 Stat. 389.

* * *

Appendix H

Lower Teton Division of Teton Basin Project, Idaho

§ 616nn. *Authorization for construction, operation, and maintenance; purposes; principal engineering features; law governing; operation consistent with storage rights agreements*

In order to assist in the irrigation of arid and semiarid lands in the upper Snake River Valley, Idaho, to provide facilities for river power opportunities created thereby and, as incidents to the foregoing purposes, to enhance recreational opportunities and provide for the conservation and development of fish and wildlife, the Secretary of the Interior is authorized to construct, operate, and maintain the Lower Teton division of the Teton Basin Federal reclamation project. The principal engineering features of the said project shall be a dam and reservoir at the Fremont site, a pumping plant, powerplant, canals and water distribution facilities, ground water development, and related facilities in the upper Snake River Valley, Idaho.

In the construction, operation, and maintenance of the said project and project works the Secretary shall be governed by the Federal reclamation laws (Act of June 17, 1902 (32 Stat. 388), and Acts amendatory thereof and supplementary thereto). The project shall be operated consistent with the existing agreements as to storage rights in the Federal reclamation reservoirs in the upper Snake River Basin. Pub.L. 88-583, § 1, Sept. 7, 1964, 78 Stat. 925.

§ 616oo. *Extension of period for repayment of construction costs; repayment from revenues derived from disposition of power*

The period provided in subsection (d) of section 485h of this title for repayment of construction costs properly allocable to any block of lands and assigned to be repaid by the irrigators may be extended to fifty years, exclusive of a development period, from the time water is first delivered to that block, or as near that number of years as is consistent with the adoption and operation of a repayment formula as therein provided. Costs allocated to irrigation in excess of the amount determined by the Secretary to be within the ability of the irrigators to repay within a fifty-year period shall be returned to the reclamation fund from revenues derived by the Secretary from the disposition of power marketed through the Bonneville Power Administration and attributable to Federal projects in Idaho. Pub. L. 88-583, § 2, Sept. 7, 1964, 78 Stat. 925.

§ 616pp. *Public recreation facilities; nonreimbursable costs; limitation of authority under existing provisions of law*

(a) The Secretary is authorized to construct, operate, and maintain or otherwise provide for basic public outdoor recreation facilities, to acquire or otherwise to include within the division area such adjacent lands or interests therein as are necessary for public recreation use, to allocate water and reservoir capacity to recreation, and to provide for the public use and enjoyment of division lands, facilities, and water areas in a manner coordinated with the other division functions. The Secretary is authorized to enter into agreements with Federal agencies or State or local public bodies for the operation, maintenance, or additional development of division lands or facilities, or to dispose of division lands or facilities to Fedderal agencies or State or local public bodies by lease, transfer, conveyance, or exchange upon such terms and conditions as will best promote the development and operation of such lands and facilities in the public interest for recreation purposes. The costs of the aforesaid undertakings, including costs of investigation, planning, Federal operation and maintenance, shall be nonreimbursable. Nothing herein shall limit the authority of the Secretary granted by existing provisions of law relating to recreation development of water resource projects or to disposition of public lands for recreation purposes.

(b) Costs of means and measures to prevent loss of and damage to fish and wildlife resources shall be considered as project costs and allocated as may be appropriate among other division functions. Pub.L. 88-583, § 3, Sept. 7, 1964, 78 Stat. 925.

§ 616qq. *Water users contracts; amendment; new contracts; power operations to absorb cost of reduction of*

annual obligations for winter water power replacements; conditions for construction of facilities; subscription of conservation capacity in Fremont reservoir, negotiations, and reports to President and Congress

(a) The Secretary is authorized to amend contracts heretofore made under the Acts of September 30, 1950 (64 Stat. 1083), and of August 31, 1954 (68 Stat. 1026), whereby the water users assumed an obligation for winter power replacement based on the winter water savings program at the Minidoka powerplant to relieve the contractors ratably by one-third of that obligation, and to make new contracts under these Acts on a like basis. To the extent such annual obligations are reduced, the cost thereof shall be included in the cost to be absorbed by the power operations of the Federal power system in Idaho.

(b) The actual construction of the facilities herein authorized shall not be undertaken until at least 80 per centum of the conservation capacity in Fremont Reservoir is under subscription, nor until negotiations have been undertaken in accordance with the provisions of (a) of this section.

(c) No construction shall be undertaken on facilities of the Lower Teton division which are required solely to provide a full water supply to lands in the Rexburg Bench area until the Secretary has submitted his report and finding of feasibility on this phase of the division to the President and to the Congress. Pub.L. 88-583, § 4, Sept. 7, 1964, 78 Stat. 926.

§ 616rr. *Authorization of appropriations*

There is hereby authorized to be appropriated for the construction of the Lower Teton division of the Teton Basin Federal reclamation project, the sum of $52,000,000, plus or minus such amounts, if any, as may be justified by reason of ordinary fluctuations in construction costs as indicated by engineering cost indexes applicable to the types of construction involved therein, and, in addition thereto, such sums as may be required to operate and maintain said division. Pub.L. 88-583, § 5, Sept. 7, 1964, 78 Stat. 926.

Appendix I

Public Law 94-400
94th Congress, S. 3542
September 7, 1976

AN ACT

To authorize the Secretary of the Interior to make compensation for damages arising out of the failure of the Teton Dam a feature of the Teton Basin Federal reclamation project in Idaho, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Congress finds that without regard to the proximate cause of the failure of the Teton Dam, it is the purpose of the United States to fully compensate any and all persons, for the losses sustained by reason of the failure of said dam. The purposes of this Act are (1) to provide just compensation for the deaths, personal injuries and losses of property, including the destruction

and damage to irrigation works, resulting from the failure on June 5, 1976, of the Teton Dam in the State of Idaho, and (2) to provide for the expeditious consideration and settlement of claims for such deaths, personal injuries, and property losses.

Sec. 2. All persons who suffered death, personal injury, or loss of property directly resulting from the failure on June 5, 1976, of the Teton Dam of the Lower Teton Division of the Teton Basin Federal reclamation project which was authorized to be constructed by the Act of September 7, 1964 (78 Stat. 925) shall be entitled to receive from the United States full compensation for such death, personal injury, or loss of property. Claimants shall submit their claims in writing to the Secretary, under such regulations as he prescribes, within two years after the date on which the regulations required by section 5 are published in the Federal Register. Claims based on death shall be submitted only by duly authorized legal representatives.

Sec. 3. (a) The Secretary of the Interior, or his designee for the purpose, acting on behalf of the United States, is hereby authorized to and shall investigate, consider, ascertain, adjust, determine, and settle any claim for money damages asserted under section 2. Except as otherwise provided herein, the laws of the State of Idaho shall apply: *Provided*, That determinations, awards, and settlements under this Act shall be limited to actual or compensatory damages measured by the pecuniary injuries or loss involved and shall not include interest prior to settlement or punitive damages.

(b) In determining the amount to be awarded under this Act the Secretary shall reduce any such amount by an amount equal to the total of insurance benefits (except life insurance benefits) or other payments or settlements of any nature previously paid with respect to such death claims, personal injury, or property loss.

(c) Payments approved by the Secretary under this Act on death, personal injury, and property loss claims, shall not be subject to insurance subrogation claims in any respect under this Act but without prejudice under other laws as provided in subsection (f).

(d) The Secretary shall not include in an award any amount for reimbursement to any insurance fund for loss payments made by such company or fund.

(e) Except as to the United States, no claim cognizable under this Act shall be assigned or transferred.

(f) The acceptance by the claimant of any award, compromise, or settlement under this Act, except an advance or partial payment made under section 4(c), shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States by reason of the same subject matter. A release shall not, however, prevent an insurer with rights as a subrogee under its own name or that of the claimant from exercising any right of action against the United States to which it may be entitled under any other laws for payments made to the claimant for a loss arising from the subject matter.

(g) Any claim for damages which may be payable in whole or in part by a claimant's insurer, shall not be paid

by the Secretary unless and until the claimant provides written proof that the insurer has denied the claim or has failed to approve or deny such claim within six months of its presentment, and the claimant assigns to the United States his rights against the insurer with respect to such claim. Upon the acceptance of any payment or settlement under this Act, the claimant shall assign to the United States any rights of action he has or may have against any third party, including an insurer.

Sec. 4. (a) In the determination and settlement of claims asserted under this Act, the Secretary shall limit himself to the determination of—

(1) whether the losses sustained directly resulted from the failure of the Teton Dam on June 5, 1976;

(2) the amounts to be allowed and paid pursuant to this Act; and

(3) the persons entitled to receive the same.

(b) The Secretary shall determine and fix the amount of awards, if any, in each claim within twelve months from the date on which the claim was submitted.

(c) At the request of a claimant, the Secretary is authorized to make advance or partial payments prior to final settlement of a claim, including final settlement on any portion or aspect of a claim determined to be logically severable. Such advance or partial payments shall be made available under regulations promulgated by the Secretary under section 5, which regulations shall include, but not be limited to, provisions for such payments where the Secretary determines that to delay pay-

ment until final settlement of the claim would impose a substantial hardship on such claimant. When a claimant pursues a remedy as provided for in section 9 of this Act, he shall be permitted to retain such advance or partial payments under a final court decision on the merits.

(d) Payments may be made for compensation for direct investments made in on-farm structural facilities in anticipation of service from the Teton Reservoir to the extent that such facilities are unuseable or are diminished in value by the denial of such service.

Sec. 5. Notwithstanding any other provision of law, the Secretary shall within fifteen days after the enactment of this Act promulgate and publish in the Federal Register, final regulations and procedures for the handling of the claims authorized in section 2 of this Act. The Secretary shall also cause to be published, in newspapers with general circulation in the State of Idaho, an explanation of the rights conferred by this Act and the procedural and other requirements imposed by the rules of procedure promulgated by him. Such explanation shall be in clear, concise, and easily understandable language. In addition, the Secretary shall also disseminate such explanation concerning such rights and procedures, and other data helpful to claimants, in the State of Idaho, by means of brochures, pamphlets, radio, television, and other media likely to reach prospective claimants.

Sec. 6. The claims program established by this Act shall, to the extent practicable, be coordinated with other disaster relief operations conducted by other Federal agencies under the Disaster Relief Act of 1974 (42 U.S.C. 5121) and other provisions of law. The Secretary shall

consult with the heads of such other Federal agencies, and shall, as he deems necessary, consistent with the expeditious determination of claims hereunder, make use of information developed by such agencies. The heads of all other Federal agencies performing disaster relief functions under the Disaster Relief Act of 1974 and other Federal authorities are hereby authorized and directed to provide the Secretary, or his designee, such information and records as the Secretary or his designee shall deem necessary for the administration of this Act.

Sec. 7. In order to expedite the repair and restoration of irrigation facilities damaged as a direct result of the failure of the Teton Dam, the Secretary is authorized and directed to enter into agreements with the owners of such facilities to finance the repair or reconstruction thereof, to the standards and conditions existing immediately prior to the failure of Teton Dam, either by direct payment or through construction contracts administered by the Bureau of Reclamation to the extent the cost of repairs or construction are not covered by insurance. The cost of such repairs or reconstruction shall be non-reimbursable.

Sec. 8. At the end of the year following approval of this Act and each year thereafter until the completion of the claims program, the Secretary shall make an annual report to the Congress of all claims submitted to him under this Act stating the name of each claimant, the amount claimed, a brief description of the claim, and the status or disposition of the claim including the amount of each administrative payment and award under the Act.

Sec. 9. (a) An action shall not be instituted in any court of the United States upon a claim against the United

States which is included in a claim submitted under this Act until the Secretary or his designee has made a final disposition of the pending claim. A pending claim may be withdrawn from consideration prior to final decision upon fifteen days written notice, and such withdrawal shall be deemed an abandonment of the claim for all purposes under this Act. After withdrawal of a claim or after the final decision of the Secretary or his designee on a claim under this Act, a claimant may elect to assert said claim or institute an action thereon against the United States in any court of competent jurisdiction under any other provision of applicable law, and upon such election there shall be no further consideration or proceedings on the claim under this Act.

(b) Any claimant aggrieved by a final decision of the Secretary under this Act may file within sixty days from the date of such decision with the United States District Court for the District of Idaho a petition praying that such decision be modified or set aside in whole or in part. The court shall hear such appeal on the record made before the Secretary. The filing of such an appeal shall constitute an election of remedies. The decision of the Secretary incorporating his findings of fact therein, if supported by substantial evidence on the record considered as a whole, shall be conclusive.

(c) Except to the extent otherwise herein provided, nothing in this Act shall be construed to prevent any claimant under this Act from exercising any rights to which he may be entitled under any other provisions of law.

(d) Attorney and agent fees shall be paid out of the awards hereunder. No attorney or agent on account of services rendered in connection with each claim shall receive in excess of 10 per centum of the amount paid in connection therewith, any contract to the contrary notwithstanding. Whoever violates this subsection shall be fined a sum not to exceed $10,000.

Sec. 10. For the purposes of this Act, the term "persons" means any individual, Indian, Indian tribe, corporation, partnership, company, municipality, township, association or other non-Federal entity.

Sec. 11. If any particular provision of this Act or the application thereof to any person or circumstance, is held invalid, the other provisions of this Act shall not be affected thereby.

Sec. 12. There are hereby authorized to be appropriated such funds as may be required to carry out the purposes of this Act.

Approved September 7, 1976.

* * *

Appendix J

§ 709. *Regulations for use of storage waters; application to Tennessee Valley Authority*

It shall be the duty of the Secretary of the Army to prescribe regulations for the use of storage allocated for flood control or navigation at all reservoirs constructed wholly or in part with Federal funds provided on the basis of such purposes, and the operation of any such

project shall be in accordance with such regulations: *Provided,* That this section shall not apply to the Tennessee Valley Authority, except that in case of danger from floods on the Lower Ohio and Mississippi Rivers the Tennessee Valley Authority is directed to regulate the release of water from the Tennessee River into the Ohio River in accordance with such instructions as may be issued by the Department of the Army.

Dec. 22, 1944, c. 665, § 7, 58 Stat. 890.

* * *

Appendix K

§ 208.11 *Regulations for use of storage allocated for flood control or navigation at reservoirs constructed wholly or in part with Federal funds.*

(a) *Purpose.* Revision of Policy and Procedures. This Regulation prescribes the policy and procedure for regulating the use of storage allocated for flood control or navigation purposes at all reservoirs capable of such regulation and constructed wholly or in part with Federal funds provided on the basis of such purposes, except projects owned and operated by the Corps of Engineers; the International Boundary and Water Commission, United States and Mexico; and those under the jurisdiction of the Columbia River Treaty. The intent of this Regulation is to establish an understanding between project owners, operating agencies, and the Corps of Engineers.

(b) *Policy.* The basic policy of the Corps of Engineers for carrying out the Congressional mandate of the cited authority is set forth below:

(1) Section 7 of the Flood Control Act of 1944 (58 Stat. 890, 33 U.S.C. 709) directs the Secretary of the Army to prescribe regulations for flood control and navigation in the following manner:

Hereafter, it shall be the duty of the Secretary of War to prescribe regulations for the use of storage allocated for flood control or navigation at all reservoirs constructed wholly or in part with Federal funds provided on the basis of such purposes, and the operation of any such project shall be in accordance with such regulations: Provided, that this section shall not apply to the Tennessee Valley Authority, except that in case of danger from floods on the lower Ohio and Mississippi Rivers the Tennessee Valley Authority is directed to regulate the release of water from the Tennessee River into the Ohio River in accordance with such instructions as may be issued by the War Department.

(2) The Chief of Engineers, U.S. Army, Corps of Engineers, is designated the duly authorized representative of the Secretary of the Army to exercise the authority set out in the Act. This Regulation will normally be implemented by letters of understanding between the Corps of Engineers and project owner and will incorporate the provisions of such letters of understanding prior to the time construction renders the project capable of significant impoundment of water. A water control agreement signed by both parties will follow when deliberate impoundment first begins or * * * at such time as the responsibility for physical operation, maintenance, and certain water control responsibilities of any Corps-owned projects may be transferred to another entity. Promulgation of this Regu-

lation for a given project will occur at such time as the name of the project appears in the FEDERAL REGISTER in accordance with paragraph (d) (11) of this section. When agreement on a water control plan cannot be reached between the Corps and the project owner after coordination with all interested parties, the project name will be entered in the FEDERAL REGISTER and the Corps of Engineers plan will be the official water control plan until such time as differences can be resolved.

(c) *Scope and terminology.* This regulation applies to Federally authorized flood control and/or navigation storage projects during the planning, design and construction phases, and throughout the life of the project. In compliance with the authority cited above, this regulation defines certain activities and responsibilities concerning water control management throughout the nation in the interest of flood control and navigation. In carrying out the conditions of this regulation, the owner and/or operating agency will comply with applicable provisions of Pub. L. 85-624, the Fish and Wildlife Coordination Act of 1958, and Pub. L. 92-500, the Federal Water Pollution Control Act Amendments of 1972. This regulation does not apply to local flood protection works governed by § 208.-10, Title 33 of the Code and permits exclusion of small reservoirs containing flood control or navigation storage of less than 12,500 acre-feet.

(1) The terms "reservoir" and "project" as used herein include all water resource impoundment projects constructed or modified, including natural lakes, that are subject to this regulation.

(2) The term "project owner" refers to the entity responsible for maintenance, physical operation, and safety of the project, and for carrying out the water control plan in the interest of flood control and/or navigation as prescribed by the Corps of Engineers. Special arrangements may be made by the project owner for "operating agencies" to perform these tasks.

(3) The term "letter of understanding" as used herein includes statements which consummate this Regulation for any given project and define the general provisions or conditions of the local sponsor, or owner. cooperation agreed to in the authorizing legislative document, and the requirements for compliance with Section 7 of the 1944 Flood Control Act .This information will be specified in the water control plan and manual. The letter of understanding will be signed by a duly authorized representative of the Chief of Engineers and the project owner. A "field working agreement" may be substituted for a letter of understanding, provided that the specified minimum requirements of the latter, as stated above, are met.

(4) The term "water control agreement" refers to a compilation of water control criteria, guidelines, diagrams, release schedules, rule curves, and specifications that basically govern the use of reservoir storage space allocated for flood control or navigation and/or release functions of a water control project for these purposes. In general, they indicate controlling or limiting rates of discharge and storage space required for flood control and/or navigation, based on the runoff potential during various seasons of the year.

(5) For the purpose of this Regulation, the term "water control plan" is limited to the plan of regulation for a water resources project in the interest of flood control and/or navigation. The water control plan must conform with proposed allocations of storage capacity and downstream conditions or other requirements to meet all functional objectives of the particular project, acting separately or in combination with other projects in a system.

(6) The term "real-time" denotes the processing of current information or data in a sufficiently timely manner to influence a physical response in the system being monitored and controlled. As used herein the term connotes . . . the analysis for and execution of water control decisions for both minor and major flood events and for navigation, based on prevailing hydrometeorological and other conditions and constraints, to achieve efficient management of water resource systems.

(d) *Procedures.* (1) *Conditions during project formulation.* During the planning and design phases, the project owner should consult with the Corps of Engineers regarding the quantity of space to reserve in the reservoir for flood control and/or navigation purposes, and for utilization of the space. Relevant matters that bear upon flood control and navigation accomplishment include: runoff potential, reservoir discharge capability, downstream channel characteristics, hydrometeorological data collection, flood hazard, flood damage characteristics, real estate acquisition for flowage requirements (fee and easement), and resources required to carry out the water control plan. Advice may also be sought on determination of and regulation for the probable maximum or other

design flood under consideration by the project owner to establish the quantity of surcharge storage space, and free-board elevation of top of dam or embankment for safety of the project.

(2) *Corps of Engineers involvement.* If the project owner is responsible for real-time implementation of the water control plan, consultation and assistance will be provided by the Corps of Engineers when appropriate and to the extent possible. During any emergency that affects flood control and/or navigation, the Corps of Engineers may temporarily prescribe regulation of flood control or navigation storage space on a day-to-day (real-time) basis without request of the project owner. Appropriate consideration will be given for other authorized project functions. Upon refusal of the project owner to comply with regulations prescribed by the Corps of Engineers, a letter will be sent to the project owner by the Chief of Engineers or his duly authorized representative describing the reason for the regulations prescribed, events that have transpired, and notification that the project owner is in violation of the Code of Federal Regulations. Should an impasse arise, in that the project owner or the designated operating entity persists in noncompliance with regulations prescribed by the Corps of Engineers, measures may be taken to assure compliance.

(3) *Corps of Engineers implementation of real-time water control decisions.* The Corps of Engineers may prescribe the continuing regulation of flood control storage space for any project subject to this regulation on a day-to-day (real-time) basis. When this is the case, consultation and assistance from the project owner to the extent

possible will be expected. Special requests by the project owner, or appropriate operating entity, are preferred before the Corps of Engineers offers advice on real-time regulation during surcharge storage utilization.

(4) *Water control plan and manual.* Prior to project completion, water control managers from the Corps of Engineers will visit the project and the area served by the project to became familiar with the water control facilities, and to insure sound formulation of the water control plan. The formal plan of regulation for flood control and/or navigation, referred to herein as the water control plan, will be developed and documented in a water control manual prepared by the Corps of Engineers. Development of the manual will be coordinated with the project owner to obtain the necessary pertinent information, and to insure compatibility with other project purposes and with surcharge regulation. Major topics in the manual will include: authorization and description of the project, hydrometeorology, data collection and communication networks, hydrologic forecasting, the water control plan, and water resource management functions, including responsibilities and coordination for water control decision-making. Special instructions to the damtender or reservoir manager on data collection, reporting to higher Federal authority, and on procedures to be followed in the event of a communication outage under emergency conditions, will be prepared as an exhibit in the manual. Other exhibits will include copies of this Regulation, letters of understanding consummating this Regulation, and the water control agreements. After approval by the Chief of Engineers or his duly authorized representative. the manual will be furnished the project owner.

(5) *Water control agreement.* (i) A water control diagram (graphical) will be prepared by the Corps of Engineers for each project having variable space reservation for flood control and/or navigation during the year; e.g., variable seasonal storage, joint-use space, or other rule curve designation. Reservoir inflow parameters will be included on the diagrams when appropriate. Concise notes will be included on the diagrams prescribing the use of storage space in terms of release schedules, runoff, nondamaging or other controlling flow rates downstream of the damsite, and other major factors as appropriate. A water control release schedule will be prepared in tabular form for projects that do not have a variable space reservation for flood control and/or navigation. The water control diagram or release schedule will be signed by a duly authorized representative of the Chief of Engineers, the project owner, and the designated operating agency, and will be used as the basis for carrying out this Regulation. Each diagram or schedule will contain a reference to this Regulation.

(ii) When deemed necessary by the Corps of Engineers, information given on the water control diagram or release schedule will be supplemented by appropriate text to assure mutual understanding on certain details or other important aspects of the water control plan not covered in this Regulation, on the water control diagram or in the release schedule. This material will include clarification of any aspects that might otherwise result in unsatisfactory project performance in the interest of flood control and/or navigation. Supplementation of the agreement will be necessary for each project where the Corps

of Engineers exercises the discretionary authority to prescribe the flood control regulation on a day-to-day (real-time) basis. The agreement will include delegation of the responsibility. The document should also cite Section 7 of the 1944 Flood Control Act and congressional legislation authorizing construction of the project.

(iii) All flood control regulations published in the Federal Register under this Section (Part 208) of the Code prior to the date of this publication and listed in paragraph 208.11(e) are hereby superseded.

(iv) Nothing in this Regulation prohibits the promulgation of specific regulations for a project in compliance with the authorizing Act (Sec. 7, Pub. L. 78-534, 58 Stat. 890 (33 U.S.C. 709)), when agreement on acceptable regulations cannot be reached between the Corps of Engineers and the owner.

(6) *Hydrometeorological instrumentation.* The project owner will provide instrumentation in the vicinity of the damsite and will provide communication equipment necessary to record and transmit hydrometeorological and reservoir data to all appropriate Federal authorities on a real-time basis. For those projects where the owner retains responsibility for real-time implementation of the water control plan, the owner will also provide or arrange for the measurement and reporting of hydrometeorological parameters required within and adjacent to the watershed and downstream of the damsite, sufficient to regulate the project for flood control and/or navigation in an efficient manner. When data collection stations outside the immediate vicinity of the damsite are required, and funds for installation, observation, and maintenance are

not available from other sources, the Corps of Engineers may agree to share the costs for such stations with the project owner. Availability of funds and urgency of data needs are factors which will be considered in reaching decisions on cost sharing.

(7) *Project safety.* The project owner is responsible for the safety of the dam and appurtenant facilities and for regulation of the project during surcharge storage utilization. Emphasis upon the safety of the dam is especially important in the event surcharge storage is utilized, which results when the total storage space reserved for flood control is exceeded. Any assistance provided by the Corps of Engineers concerning surcharge regulation is to be utilized at the discretion of the project owner, and does not relieve the owner of the responsibility for safety of the project.

(8) *Notification of the general public.* The Corps of Engineers and other interested Federal and State agencies, and the project owner will jointly sponsor public involvement activities, as appropriate, to fully apprise the general public of the water control plan. Public meetings or other effective means of notification and involvement will be held, with the initial meeting being conducted as early as practicable but not later than the time the project first becomes operational. Notice of the initial public meeting shall be published once a week for three consecutive weeks in one or more newspapers of general circulation published in each county covered by the water control plan. Such notice shall also be used when appropriate to inform the public of modifications in the water control plan. If no newspaper is published in a county, the notice shall be published in one or more newspapers of general

circulation within that county. For the purposes of this Section a newspaper is one qualified to publish public notices under applicable state law. Notice shall be given in the event significant problems are anticipated or experienced that will prevent carrying out the approved water control plan or in the event that an extreme water condition is expected that could produce severe damage to property or loss of life. The means for conveying this information shall be commensurate with the urgency of the situation. The water control manual will be made available for examination by the general public upon request at the appropriate office of the Corps of Engineers, project owner or designated operating agency.

(9) *Other generalized requirements for flood control and navigation.* (i) Storage space in the reservoirs allocated for flood control and navigation purposes shall be kept available for those purposes in accordance with the water control agreement, and the plan of regulation in the water control manual.

(ii) Any water impounded in the flood control space defined by the water control agreement shall be evacuated as rapidly as can be safely accomplished without causing downstream flows to exceed the controlling rates; i.e., releases from reservoirs shall be restricted insofar as practicable to quantities which, in conjunction with uncontrolled run-off downstream of the dam, will not cause water levels to exceed the controling stages currently in force. Although conflicts may arise with other purposes, such as hydropower, the plan or regulation may require releases to be completely curtailed in the interest of flood control or safety of the project.

(iii) Nothing in the plan of regulation for flood control shall be construed to require or allow dangerously rapid changes in magnitudes of releases. Releases will be made in a manner consistent with requirements for protecting the dam and reservoir from major damage during passage of the maximum design flood for the project.

(iv) The project owner shall monitor current reservoir and hydrometeorological conditions in and adjacent to the watershed and downstream of the dam-site, as necessary. This and any other pertinent information shall be reported to the Corps of Engineers on a timely basis, in accordance with standing instructions to the damtender or other means requested by the Corps of Engineers.

(v) In all cases where the project owner retains responsibility for realtime implemenatation of the water control plan, he shall make current determinations of: reservoir inflow, flood control storage utilized, and scheduled releases. He shall also determine storage space and releases required to comply with the water control plan prescribed by the Corps of Engineers. The owner shall report this information on a timely basis as requested by the Corps of Engineers.

(vi) The water control plan is subject to temporary modification by the Corps of Engineers if found necessary in time of emergency. Requests for and action on such modifications may be made by the fastest means of communication available. The action taken shall be confirmed in writing the same day to the project owner and shall include justification for the action.

(vii) The project owner may temporarily deviate from the water control plan in the event an immediate

short-term departure is deemed necessary for emergency reasons to protect the safety of the dam, or to avoid other serious hazards. Such actions shall be immediately reported by the fastest means of communication available. Actions shall be confirmed in writing the same day to the Corps of Engineers and shall include justification for the action. Continuation of the deviation will require the express approval of the Chief of Engineers, or his duly authorized representative.

(viii) Advance approval of the Chief of Engineers, or his duly authorized representative, is required prior to any deviation from the plan of regulation prescribed or approved by the Corps of Engineers in the interest of flood control and/or navigation, except in emergency situations provided for in paragraph d(9) (vii) above. When conditions appear to warrant a prolonged deviation from the approved plan, the project owner and the Corps of Engineers will jointly investigate and evaluate the proposed deviation to insure that the overall integrity of the plan would not be unduly compromised. Approval of prolonged deviations will not be granted unless such investigations and evaluations have been conducted to the extent deemed necessary by the Chief of Engineers, or his designated representatives, to fully substantiate the deviation.

(10) *Revisions.* The water control plan and all associated documents will be revised by the Corps of Engineers, as necessary, to reflect changed conditions that come to bear upon flood control and navigation, e.g., reallocation of reservoir storage space due to sedimentation or transfer of storage space to a neighboring project. Revision of the water control plan, water control

agreement, water control diagram, or release schedule requires approval of the Chief of Engineers or his duly authorized representative. Each such revision shall be effective upon the date specified in the approval. The original (signed document) water control agreement shall be kept on file in the Office, Chief of Engineers, Department of the Army, Washington, D.C. Copies of the agreement shall be kept on file in and may be obtained from the office of the project owner, or from the office of the appropriate Division Engineer, Corps of Engineers.

(11) FEDERAL REGISTER. The following information for each project subject to Section 7 of the 1944 Flood Control Act shall be published in the *FEDERAL REGISTER* prior to the time the project becomes operational and prior to any significant impoundment before project completion or * * * at such time as the responsibility for physical operation and maintenance of the Corps of Engineers owned projects is transferred to another entity: (i) reservoir, dam, and lake names, (ii) stream, county and state corresponding to the damsite location, (iii) the maximum current storage space in acre-feet to be reserved exclusively for flood control and/or navigation purposes, or any multiple-use space (intermingled) when flood control or navigation is one of the purposes. with corresponding elevations in feet above mean sea level, and area in acres, at the upper and lower limits of said space, (iv) the name of the project owner, and (v) congressional legislation authorizing the project for Federal participation.

(e) *List of projects.* The following tables, "PERTINENT PROJECT DATA—SECTION 208.11 REGULATION," show the pertinent data for projects which are subject to this Regulation.

PERTINENT PROJECT DATA - SECTION 208.11 REGULATION

PROJECT NAME	STREAM	COUNTY & STATE	EXCLUSIVE					MULTIPLE-USE					PROJECT OWNER	AUTH. LEGIS.
			FLOOD CONTROL/NAVIGATION					FLOOD CONTROL/NAVIGATION						
			STORAGE	ELEV. LIMITS		AREA		STORAGE	ELEV. LIMITS		AREA			
			1000	feet m.s.l.		acres		1000	feet m.s.l.		acres			
			ac-ft.	UPPER	LOWER	UPPER	LOWER	ac-ft.	UPPER	LOWER	UPPER	LOWER		
Alpine Dam	Keith Creek	Winnebago, Il	0.585	796.0	764.0	51.88	0	-	-	-	-	-	City of Rock-Ford, Il	PWA Proj.
Agency Valley Dam & Res.	N. Fork Malheur River	Malheur, Or.	-	-	-	-	-	60.0	3340.0	3263.21	1900	0	Bureau of Rec.	PL 68-292
Bear Creek Dam	Bear Creek	Marion & Ralls, Mo.	8.7	564.5	520.0	540	0	-	-	-	-	-	City of Hannibal, Mo.	PL 83-780
Big Dry Creek and Diversion	Big Dry Creek and Dog Creek	Fresno, Ca.	16.25	425.0	393.0	1530	0	-	-	-	-	-	Reclamation Board Ca.	PL 77-228
Bonny Dam & Res.	S. Fork Republican River	Yuma, Co.	129.0	3710.0	3672.0	5,036	2042	-	-	-	-	-	Bureau of Rec.	PL 78-534
Boysen Dam & Res.	Wind River	Fremont, Wy.	150.0	4732.2	4725.0	22116	19560	150	4725.0	4717.0	19560	16955	Bureau of Rec.	PL 78-534
Bully Creek Dam & Reservoir	Bully Creek	Malheur, Or.						31.65	2523.0	2456.8	1082	140	Bureau of Rec.	PL 86-248
Camanche Dam & Reservoir	Mokelumne River	San Joaquin, Ca.	-	-	-	-	-	200.0	235.5	205.1	7600	5507	East Bay Mun Util Dist, Oakland, Ca.	PL 86-645
Cedar Bluff Dam & Reservoir	Smoky Hill River	Trego, Ks.	192.0	2166.0	2144.0	10790	6869	-	-	-	-	-	Bureau of Rec.	PL 78-534
Clark Canyon Dam & Reservoir	Beaverhead River	Beaverhead, Mt.	79.1	5560.4	5546.1	5903	5160	50.5	5546.1	5535.7	5160	4496	Bureau of Rec.	PL 78-534
Devil Creek Dam & Reservoir	Devil Creek, Malad River	Oneida, Id.	-	-	-	-	-	2.0	5172.4	5156.1	140	100	Malad Valley Irrigating Co.	PL 84-984

PERTINENT PROJECT DATA - SECTION 208.11 REGULATION

NAME	STREAM	STATE	EXCLUSIVE					MULTIPLE-USE					PROJECT OWNER	AUTH. LEGIS.
			FLOOD CONTROL/NAVIGATION					FLOOD CONTROL/NAVIGATION						
			STORAGE	ELEV. LIMITS		AREA		STORAGE	ELEV. LIMITS		AREA			
			1000 ac-ft.	feet m.s.l. UPPER	LOWER	acres UPPER	LOWER	1000 ac-ft.	feet m.s.l. UPPER	LOWER	acres UPPER	LOWER		
Emigrant Dam & Reservoir	Emigrant Creek	Jackson, Or.	39.0	2241.0	2131.5	801	80	-	-	-	-	-	Bureau of Rec.	PL 83-606
Enders Dam & Reservoir	Frenchman Creek	Chase, Nb.	30.0	3127.0	3112.3	2405	1707	-	-	-	-	-	Bureau of Rec.	PL 78-534
Folsom Dam & Lake	American River	Sacramento, Ca	-	-	-	-	-	400.0	466.0	427.0	11450	9040	Bureau of Rec.	PL 81-356
Friant Dam & Res (Millerton Lake)	San Joaquin River	Fresno, Ca.	-	-	-	-	-	390.0	578.0	466.3	4850	2101	Bureau of Rec.	PL 75-392 & PL 76-868
Glen Elder Dam & Waconda Lake	Solomon River	Mitchell, Ks.	722.0	1488.3	1455.6	33682	12602	-	-	-	-	-	Bureau of Rec.	PL 78-534 & PL 79-526
Glendo Dam & Reservoir	North Platte River	Platte, Wy.	271.9	4653.0	4635.0	17986	12365	-	-	-	-	-	Bureau of Rec.	PL 78-534
Heart Butte Dam & Lake Tschida	Heart River	Grant, N.D.	150.0	2094.5	2064.5	6625	3400	-	-	-	-	-	Bureau of Rec.	PL 78-534
Hoover Dam & Lake Mead	Colorado River	Clark NV & Mohave, Az.	1500.0	1229.0	1219.6	162700	156500	15853.0	1219.6	1083.0	156500	83500	Bureau of Rec.	PL 70-642
Hungry Horse Dam & Reservoir	S. Fork Flathead River	Flathead, Mt.	2982.0	3560.0	3336.0	23800	5400	-	-	-	-	-	Bureau of Rec.	PL 78-329
Jamestown Dam & Reservoir	James River	Stutsman, N.D.	185.4	1454.0	1432.67	13206	2555	6.6	143267	1429.8	2555	2085	Bureau of Rec.	PL 78-534
Keyhole Dam & Reservoir	Belle Fourche River	Crook, Wy.	140.2	4111.5	4099.3	13686	9394	-	-	-	-	-	Bureau of Rec.	PL 78-534

PERTINENT PROJECT DATA - SECTION 208.11 REGULATION

PROJECT NAME	STREAM	COUNTY & STATE	EXCLUSIVE FLOOD CONTROL/NAVIGATION STORAGE 1000 ac-ft.	ELEV. LIMITS feet m.s.l. UPPER	ELEV. LIMITS feet m.s.l. LOWER	AREA acres UPPER	AREA acres LOWER	MULTIPLE-USE FLOOD CONTROL/NAVIGATION STORAGE 1000 ac-ft.	ELEV. LIMITS feet m.s.l. UPPER	ELEV. LIMITS feet m.s.l. LOWER	AREA acres UPPER	AREA acres LOWER	PROJECT OWNER	AUTH. LEGIS.
Kirwin Dam & Reservoir	N. Fork Solomon River	Phillips, Ks.	215.115	1757.3	1729.25	10640	5080	-	-	-	-	-	Bureau of Rec.	PL 78-534
Little Wood River Dam & Reservoir	Little Wood River	Blain, Id.	30.0	5237.3	5127.8	574	0	-	-	-	-	-	Bureau of Rec.	PL 84-993
Logan Martin Dam & Reservoir	Coosa River	Talladega, Al	245.3	477	465	26310	15260	-	-	-	-	-	Alabama Power Co.	PL 83-436
Los Banos Dam & Detention Res.	Los Banos Creek	Merced, Ca.	-	-	-	-	-	14.0	353.5	327.8	619	467	Bureau of Rec.	PL 86-488
Lovewell Dam & Reservoir	White Rock Creek	Jewell, Ks.	50.0	1595.3	1582.6	5025	2985	-	-	-	-	-	Bureau of Rec.	PL 78-534
Markham Ferry Dam & Lake Wash E. Hudson	Grand (Neosho) River	Mayes, Ok.	244.2	636.0	619.0	18800	10900	-	-	-	-	-	Grand River Dam Authority	PL 76-476
Medicine Creek Dam & Harry Strunk Lake	Medicine Creek	Frontier, Nb.	52.0	2336.2	2366.1	3465	1850	-	-	-	-	-	Bureau of Rec.	PL 78-534
New Exchequer Dam & Lake McClure	Merced River	Tuolomne, Ca.	-	-	-	-	-	400.0	867.0	799.7	7110	4849	Merced Irrigation Dist	PL 86-645
Norton Dam & Reservoir	Prairie Dog Creek	Norton, Ks.	100.0	2331.4	2304.3	5316	2181	-	-	-	-	-	Bureau of Rec.	PL 78-534

PERTINENT PROJECT DATA - SECTION 208.11 REGULATION

PROJECT NAME	STREAM	COUNTY & STATE	EXCLUSIVE FLOOD CONTROL/NAVIGATION STORAGE 1000 ac-ft.	ELEV. LIMITS feet m.s.l. UPPER	ELEV. LIMITS feet m.s.l. LOWER	AREA acres UPPER	AREA acres LOWER	MULTIPLE-USE FLOOD CONTROL/NAVIGATION STORAGE 1000 ac-ft.	ELEV. LIMITS feet m.s.l. UPPER	ELEV. LIMITS feet m.s.l. LOWER	AREA acres UPPER	AREA acres LOWER	PROJECT OWNER	AUTH. LEGIS.
Ochoco Dam & Reservoir	Ochoco Creek	Crook, Or.	51.4	3136.2	3048.1	1150	120	-	-	-	-	-	Bureau of Rec.	PL 84-992
Oroville Dam & Lake	Feather River	Butte, Ca.	-	-	-	-	-	750.0	900.0	848.5	15800	13346	Calif. Dept of Water Resources	PL 85-500
Pactola Dam & Reservoir	Rapid Creek	Pennington, S.D.	43.0	4621.5	4580.2	1232	860	-	-	-	-	-	Bureau of Rec.	PL 78-534
Palisades Dam & Reservoir	Snake River	Bonneville, Id.	1202.0	5620.0	5452.43	16100	2170	-	-	-	-	-	Bureau of Rec.	PL 81-864
Platora Dam & Reservoir	Conejos River	Conejos, Co.	6.0	10034.0	10027.5	947	920	540	10027.5	994.5	920	0	Bureau of Rec.	PL 76-640
Prineville Dam & Reservoir	Crooked Creek	Crook, Or.	153.0	3234.8	3112.0	2990	120	-	-	-	-	-	Bureau of Rec.	PL 84-992
Prosser Creek & Reservoir	Prosser Creek	Nevada, Ca.	-	-	-	-	-	20.0	5741.2	5703.7	745	334	Bureau of Rec.	PL 84-858
Red Willow Dam & Hugh Butler Lake	Red Willow Creek	Frontier, Nb.	50.0	2604.9	2581.8	2682	1629	-	-	-	-	-	Bureau of Rec.	PL 78-534 & PL 85-78
Savage River Dam & Reservoir	Savage River	Garrett, Md.	-	-	-	-	-	16.028	1468.5	1400.0	366	127	Upper Potomac River Commission	PL 79-526
Shadehill Dam & Reservoir	Grand River	Perkins, S.D.	217.7	2302.2	2272.0	9900	4800	-	-	-	-	-	Bureau of Rec.	PL 78-534
Shasta Dam & Lake	Sacremento River	Shasta, Ca.	-	-	-	-	-	1300.0	1067.0	1018.6	29570	23894	Bureau of Rec.	PL 75-392 & PL 76-868

PERTINENT PROJECT DATA - SECTION 208.11 REGULATION

PROJECT NAME	STREAM	COUNTY & STATE	EXCLUSIVE FLOOD CONTROL/NAVIGATION STORAGE 1000 ac-ft.	ELEV. LIMITS feet m.s.l. UPPER	ELEV. LIMITS feet m.s.l. LOWER	AREA acres UPPER	AREA acres LOWER	MULTIPLE-USE FLOOD CONTROL/NAVIGATION STORAGE 1000 ac-ft.	ELEV. LIMITS feet m.s.l. UPPER	ELEV. LIMITS feet m.s.l. LOWER	AREA acres UPPER	AREA acres LOWER	PROJECT OWNER	AUTH. LEGIS.
Trenton Dam & Reservoir	Republican River	Hitchcock, Nb.	134.0	2773.0	2752.0	7975	4974	-	-	-	-	-	Bureau of Rec.	PL 78-534
Twitchell Dam & Reservoir	Cuyama River	Santa Barbara, Ca.	89.0	651.5	623.0	3690	2650	-	-	-	-	-	Bureau of Rec.	PL 83-774
Warm Springs Dam & Res.	Middle Fork Malheur River	Malheur, Or.	-	-	-	-	-	191.0	3406.0	3327.0	4600	90	50% Vale Irr Dist. & 50% Bureau of Rec.	-
Waterbury Dam & Reservoir	Little River	Washington, Vt.	27.7	617.5	592.0	1330	890	-	-	-	-	-	State of Vermont	PL 78-534
Weiss Dam & Reservoir	Coosa River	Cherokee, Al.	397.0	574	546	50000	30200	-	-	-	-	-	Alabama Power Co.	PL 83-436
Yellowtail Dam & Bighorn Lake	Bighorn River	Big Horn, Mt.	259.0	3657.0	3640.0	17298	12685	250.0	3640.0	3614.0	12685	7410	Bureau of Rec.	PL 78-534

(Sec. 7, Pub. L. 78-534, 58 Stat. 890 (33 U.S.C. 709)) [41 FR 20401, May 18, 1976]

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Appendix 2

Title 33—Navigation and Navigable Waters

CHAPTER II—CORPS OF ENGINEERS, DEPARTMENT OF THE ARMY

PART 208—FLOOD CONTROL REGULATIONS

Use of Storage Allocated for Flood Control or Navigation at Reservoirs Constructed Wholly or in Part With Federal Funds

On 26 November 1975 notice was published in the FEDERAL REGISTER (40 FR 54799) that the Corps of Engineers was proposing revised regulation's prescribing the policy and procedures to govern the use of storage allocated for flood control and/or navigation at all reservoirs constructed wholly or in part with Federal funds as directed by Section 7 of the Flood Control Act of 1944. Interested persons were given until 15 December 1975 to submit written comments. Full and careful consideration was given to all written comments received.

The final Regulation has been revised to reflect applicable comments and other suggested improvements:

(a) *Summary of comments.* (1) The National Newspaper Association suggested in their comments dated 15 December 1975, that § 208.4(h) of the proposed Regulation be amended to provide for informing the general public through the use of public notices in newspapers. This suggestion has been adopted and the final Regulation is revised to include the requirement for publishing public notices in one or more newspapers of general circulation in each county affected by the water control plan.

(2) The Tennessee Valley Authority in their comments dated 17 December 1975 pointed out that, while the proposed procedures differ in several respects from techniques used by them in the operation of their facilities, the Regulation appears workable and well thought out. No specific comments were furnished by the Authority.

(3) The Office of the Secretary, U.S. Department of Agriculture (USDA) in letter dated 29 December 1975 recommended that reservoirs with less than 12,500 acre-feet of flood control storage capacity, as well as ungated structures, be excluded from the Regulation.

(i) The Deputy Assistant Secretary, Mr. Paul A. Vander Myde stated in his letter that the USDA programs which would be affected by the Section 7 Regulation are principally those administered by the Soil Conservation Service and the Forest Service. The small reservoirs administered by these agencies are designed to accomplish limited flood control objectives in relatively small watersheds automatically, without regulation of releases. In no case does their flood control storage capacity exceed 12,500 acre-feet. Furthermore, only 15–20 dams have control devices that permit joint use of the flood control storage and these are designed for optimum use of the sites for flood control and irrigation water supply.

The Corps of Engineers agrees with the Secretary that compliance with the Section 7 Regulation would be excessively time consuming, constitute hardship on the many non-Federal owners of these small dams, and serve no useful purpose for ungated dams administered by those agencies. Consequently, § 208.3 of the proposed Regulation has been amended to permit exclusion of small reservoir projects containing flood control and/or navigation storage of less than 12,500 acre-feet.

(ii) Other comments furnished in the referenced letter from the Office of the Secretary, USDA, cited the need to revise the proposed Regulation to provide for input from other agencies when a project is located on Federal land, as well as to provide for public involvement.

The Corps of Engineers recognizes the need for input to the water control plan by other interested agencies and the involvement of the general public in the development of the plan. Accordingly, § 208.4(h) of the proposed Regulation has been clarified in this regard and the final Regulation provides for joint sponsorship of public involvement activities by other interested Federal and State agencies whenever it is practicable to do so.

(4) Comments were furnished separately by the Office of the Secretary, U.S. Department of the Interior (USDI) and the Commissioner of the Bureau of Reclamation (USBR).

(i) In his letter of 12 January 1976, Commissioner Stamm, USBR, expressed the Bureau's concurrence in the Corps of Engineers proposal for streamlining the procedures for issuing flood control regulations on multiple-purpose dams that include authorization for flood control. He agreed with most of the provisions of the Regulation. In his letter, the Commissioner made recommendations and suggestions for revising certain paragraphs of the Regulation as follows:

(A) The Bureau recommends that paragraph 208.2(b) of the proposed Regulation be revised to state that the Regulation be implemented by a "memorandum of agreement" between the Corps of Engineers and the project owner prior to the time construction renders the project capable of significant impoundment of water for flood control and navigation, and by a subsequent water control diagram or release schedule signed by both parties prior to the deliberate impoundment for such storage purpose or * * *.

The Corps of Engineers is directed by Section 7 of the 1944 Flood Control Act, Public Law 78–534, "to prescribe regulations for the use of storage allocated for flood control or navigation at all reservoirs constructed wholly or in part with Federal funds * * *." Although, as indicated by Commissioner Stamm, cooperative efforts reported by the Bureau's field offices have been highly successful in a few instances complete agreement on a water control plan and execution of the prescribed regulation plan have not been consummated. As it is mandatory for the Corps of Engineers to prescribe regulations, with or without agreement with the project owner, the Corps feels it is necessary to retain the concept of the letter of understanding, in lieu of a memorandum of agreement as recommended. Paragraph (c)(3) of § 208.11 has been added to the final Regulation which specifies minimum requirements for consummating the letter of understanding. The policy of full cooperation with the owner and designated operating agency in the development of the water control plan will remain a Corps of Engineers objective and will be extended to the maximum extent practicable.

(B) All or portions of the Bureau's recommendations regarding the wording in §§ 208.3(d), 208.4(e)(3), 208.4(i) and 208.5 of the proposed Regulation have been accepted and appropriate revisions made in the final Regulation.

Specific recommendations regarding these paragraphs which have not been found acceptable are the deletion of the latter part, remaining portion following the first sentence, of § 208.4(a) and changes in the wording of the third sentence of § 208.4(e)(2). These recommendations have not been accepted because the Corps of Engineers feels the referenced portions are needed for clarity in setting out procedures to be followed in prescribing specific regulations for projects subject to this Regulation.

(C) The Bureau's recommendation for revising the first sentence and deleting the last sentence of paragraph 208.4(c) of the proposed Regulation has not been found acceptable because the Corps of Engineers prescribes day-to-day (real-time) regulation of several projects as a routine practice and not just in special cases. This is necessary because these projects are part of a reservoir system and must be regulated in concert with other basin elements for effective and efficient project performance. Paragraph (d)(8) of § 208.11 of the final Regulation has been revised however, to better define the cooperative relationships needed for carrying out the objectives of the Regulation.

(D) The Bureau's recommendation to delete the first sentence and the latter portion of the second sentence of § 208.4 (d) of the proposed Regulation is not acceptable. The Corps of Engineers feels that visits to the project by water control managers are desirable, if not necessary, prior to project completion so that familiarity with the water control facilities can be gained. A degree of cooperative

ness can also be established between water control managers and operating personnel assigned to the project.

(E) The recommendation of the Bureau regarding deletion of a portion of the first sentence of § 208.4(k) of the proposed Regulation is unacceptable.

Any significant storage within a reservoir for whatever purpose can have an appreciable effect upon basin flooding and may require purposeful and specific operation of facilities. Consequently, as a minimum, an interim plan of regulation must be developed and documented. Accordingly, the final Regulation retains the requirement for publication of Section 7 regulations prior to any significant impoundment within a project.

(ii) In letter dated 22 January 1976, the Deputy Assistant Secretary, USDI, recommended revision of the proposed Regulation to include specific mention and reference to the Fish and Wildlife Coordination Act. He also indicated language that should be incorporated to insure that coordination relative to reservoir drawdown is carried out by the Corps with the appropriate fish and wildlife administrating agencies.

Paragraphs (c) and (d)(8) of § 208.11 have been amended in accordance with these recommendations to include reference to the Fish and Wildlife Coordination Act and special mention has been made in the final Regulation of coordination efforts to be accomplished with other interested Federal and State agencies. Reference has also been made to Public Law 92-500, the Federal Water Pollution Control Act Amendments of 1972.

(b) Revision to the proposed Regulation prior to promulgation.

(1) Other significant changes have been made in the proposed Regulation as follows:

(i) Paragraph 208.11(a). Excepted projects have been extended to those under the jurisdiction of the Columbia River Treaty.

(ii) Paragraph 208.11(d)(5)(iv) has been added so as to retain the opportunity for promulgation of specific regulations for a project in compliance with the authorizing Act and to cover those projects which have specific regulations promulgated but do not now have water control agreements consummated as specified in §§ 208.11(c)(3) and 208.11(c)(4).

(iii) Paragraph 208.11(d)(2) has been amended to include procedures for handling project regulations in the event of noncompliance by the project owner or designated operating agency, and to indicate that measures may be taken should an impasse arise between the Corps of Engineers and the project owner regarding compliance.

(iv) Paragraph 208.11(e). Certain projects have been removed from the listing of initially applicable projects pending consummation of water control agreements in accordance with provisions of § 208.11(d)(5).

c. *Final rule making:* Notice is hereby given that the Secretary of the Army (acting through the Chief of Engineers) is revising regulations prescribing the policy and procedures to govern the use of storage allocated for flood control or navigation at all reservoirs constructed wholly or in part with Federal funds as directed by Section 7 of the Flood Control Act of 1944. These regulations are intended to establish an understanding between project owners, operating agencies and the Corps of Engineers with regard to certain activities and responsibilities concerning water control management throughout the nation in the interest of flood control and navigation. Initially, these generalized regulations will be applicable to those projects for which specific regulations have been published in the FEDERAL REGISTER under this section (Part 208) of the Code and which will be superseded by these regulations. Specific information as defined in § 208.11(d)(11), for the initially applicable projects has been abstracted from the appropriate codified regulations to be deleted, and published in § 208.11(e) of this regulation. Periodically, and at least annually, additional projects will be added to the list in § 208.11(e) by publication of required information, defined in § 208.11(d)(11)), in the FEDERAL REGISTER.

(d) Effective date: This regulation shall become effective on May 15, 1976.

Dated: May 11, 1976.

MARVIN W. REES,
Colonel, Corps of Engineers,
Executive Director of Civil Works.

Section 208.11 is added to read as follows:

AUTHORITY: Sec. 7, Pub. L. 78-534, 58 Stat. 890 (33 U.S.C. 709).

§ 208.11 Regulations for use of storage allocated for flood control or navigation at reservoirs constructed wholly or in part with Federal funds.

(a) *Purpose.* Revision of Policy and Procedures. This Regulation prescribes the policy and procedure for regulating the use of storage allocated for flood control or navigation purposes at all reservoirs capable of such regulation and constructed wholly or in part with Federal funds provided on the basis of such purposes, except projects owned and operated by the Corps of Engineers; the International Boundary and Water Commission, United States and Mexico; and those under the jurisdiction of the Columbia River Treaty. The intent of this Regulation is to establish an understanding between project owners, operating agencies, and the Corps of Engineers.

(b) *Policy.* The basic policy of the Corps of Engineers for carrying out the Congressional mandate of the cited authority is set forth below:

(1) Section 7 of the Flood Control Act of 1944 (58 Stat. 890, 33 U.S.C. 709) directs the Secretary of the Army to prescribe regulations for flood control and navigation in the following manner:

Hereafter, it shall be the duty of the Secretary of War to prescribe regulations for the use of storage allocated for flood control or navigation at all reservoirs constructed wholly or in part with Federal funds provided on the basis of such purposes, and the operation of any such project shall be in accordance with such regulations: Provided, that this section shall not apply to the Tennessee Valley Authority, except that in case of danger from floods on the lower Ohio and Mississippi Rivers the Tennessee Valley Authority is directed to regulate the release of water from the Tennessee River into the Ohio River in accordance with such instructions as may be issued by the War Department.

(2) The Chief of Engineers, U.S. Army, Corps of Engineers, is designated the duly authorized representative of the Secretary of the Army to exercise the authority set out in the Act. This Regulation will normally be implemented by letters of understanding between the Corps of Engineers and project owner and will incorporate the provisions of such letters of understanding prior to the time construction renders the project capable of significant impoundment of water. A water control agreement signed by both parties will follow when deliberate impoundment first begins or * * * at such time as the responsibility for physical operation, maintenance, and certain water control responsibilities of any Corps-owned projects may be transferred to another entity. Promulgation of this Regulation for a given project will occur at such time as the name of the project appears in the FEDERAL REGISTER in accordance with paragraph (d)(11) of this section. When agreement on a water control plan cannot be reached between the Corps and the project owner after coordination with all interested parties, the project name will be entered in the FEDERAL REGISTER and the Corps of Engineers plan will be the official water control plan until such time as differences can be resolved.

(c) *Scope and terminology.* This regulation applies to Federally authorized flood control and/or navigation storage projects during the planning, design and construction phases, and throughout the life of the project. In compliance with the authority cited above, this regulation defines certain activities and responsibilities concerning water control management throughout the nation in the interest of flood control and navigation. In carrying out the conditions of this regulation, the owner and/or operating agency will comply with applicable provisions of Pub. L. 85-624, the Fish and Wildlife Coordination Act of 1958, and Pub. L. 92-500, the Federal Water Pollution Control Act Amendments of 1972. This regulation does not apply to local flood protection works governed by § 208.10, Title 33 of the Code and permits exclusion of small reservoirs containing flood control or navigation storage of less than 12,500 acre-feet.

(1) The terms "reservoir" and "project" as used herein include all water resource impoundment projects constructed or modified, including natural lakes, that are subject to this regulation.

(2) The term "project owner" refers to the entity responsible for maintenance, physical operation, and safety of

the project, and for carrying out the water control plan in the interest of flood control and/or navigation as prescribed by the Corps of Engineers. Special arrangements may be made by the project owner for "operating agencies" to perform these tasks.

(3) The term "letter of understanding" as used herein includes statements which consummate this Regulation for any given project and define the general provisions or conditions of the local sponsor, or owner, cooperation agreed to in the authorizing legislative document, and the requirements for compliance with Section 7 of the 1944 Flood Control Act. This information will be specified in the water control plan and manual. The letter of understanding will be signed by a duly authorized representative of the Chief of Engineers and the project owner. A "field working agreement" may be substituted for a letter of understanding, provided that the specified minimum requirements of the latter, as stated above, are met.

(4) The term "water control agreement" refers to a compilation of water control criteria, guidelines, diagrams, release schedules, rule curves, and specifications that basically govern the use of reservoir storage space allocated for flood control or navigation and/or release functions of a water control project for these purposes. In general, they indicate controlling or limiting rates of discharge and storage space required for flood control and/or navigation, based on the runoff potential during various seasons of the year.

(5) For the purpose of this Regulation, the term "water control plan" is limited to the plan of regulation for a water resources project in the interest of flood control and/or navigation. The water control plan must conform with proposed allocations of storage capacity and downstream conditions or other requirements to meet all functional objectives of the particular project, acting separately or in combination with other projects in a system.

(6) The term "real-time" denotes the processing of current information or data in a sufficiently timely manner to influence a physical response in the system being monitored and controlled. As used herein the term connotes . . . the analysis for and execution of water control decisions for both minor and major flood events and for navigation, based on prevailing hydrometeorological and other conditions and constraints, to achieve efficient management of water resource systems.

(d) *Procedures.* (1) *Conditions during project formulation.* During the planning and design phases, the project owner should consult with the Corps of Engineers regarding the quantity of space to reserve in the reservoir for flood control and/or navigation purposes, and for utilization of the space. Relevant matters that bear upon flood control and navigation accomplishment include: runoff potential, reservoir discharge capability, downstream channel characteristics, hydrometeorological data collection, flood hazard, flood damage characteristics, real estate acquisition for flowage requirements (fee and easement), and resources required to carry out the water control plan. Advice may also be sought on determination of and regulation for the probable maximum or other design flood under consideration by the project owner to establish the quantity of surcharge storage space, and freeboard elevation of top of dam or embankment for safety of the project.

(2) *Corps of Engineers involvement.* If the project owner is responsible for real-time implementation of the water control plan, consultation and assistance will be provided by the Corps of Engineers when appropriate and to the extent possible. During any emergency that affects flood control and/or navigation, the Corps of Engineers may temporarily prescribe regulation of flood control or navigation storage space on a day-to-day (real-time) basis without request of the project owner. Appropriate consideration will be given for other authorized project functions. Upon refusal of the project owner to comply with regulations prescribed by the Corps of Engineers, a letter will be sent to the project owner by the Chief of Engineers or his duly authorized representative describing the reason for the regulations prescribed, events that have transpired, and notification that the project owner is in violation of the Code of Federal Regulations. Should an impasse arise, in that the project owner or the designated operating entity persists in noncompliance with regulations prescribed by the Corps of Engineers, measures may be taken to assure compliance.

(3) *Corps of Engineers implementation of real-time water control decisions.* The Corps of Engineers may prescribe the continuing regulation of flood control storage space for any project subject to this regulation on a day-to-day (real-time) basis. When this is the case, consultation and assistance from the project owner to the extent possible will be expected. Special requests by the project owner, or appropriate operating entity, are preferred before the Corps of Engineers offers advice on real-time regulation during surcharge storage utilization.

(4) *Water control plan and manual.* Prior to project completion, water control managers from the Corps of Engineers will visit the project and the area served by the project to become familiar with the water control facilities, and to insure sound formulation of the water control plan. The formal plan of regulation for flood control and/or navigation, referred to herein as the water control plan, will be developed and documented in a water control manual prepared by the Corps of Engineers. Development of the manual will be coordinated with the project owner to obtain the necessary pertinent information, and to insure compatibility with other project purposes and with surcharge regulation. Major topics in the manual will include: authorization and description of the project, hydrometeorology, data collection and communication networks, hydrologic forecasting, the water control plan and water resource management functions, including responsibilities and coordination for water control decision-making. Special instructions to the dam tender or reservoir manager on data collection, reporting to higher Federal authority, and on procedures to be followed in the event of a communications outage under emergency conditions, will be prepared as an exhibit in the manual. Other exhibits will include copies of this Regulation, letters of understanding consummating this Regulation, and the water control agreements. After approval by the Chief of Engineers or his duly authorized representative, the manual will be furnished the project owner.

(5) *Water control agreement.* (i) A water control diagram (graphical) will be prepared by the Corps of Engineers for each project having variable space reservation for flood control and or navigation during the year; e.g., variable seasonal storage, joint-use space, or other rule curve designation. Reservoir inflow parameters will be included on the diagrams when appropriate. Concise notes will be included on the diagrams prescribing the use of storage space in terms of release schedules, runoff, non-damaging or other controlling flow rates downstream of the damsite, and other major factors as appropriate. A water control release schedule will be prepared in tabular form for projects that do not have a variable space reservation for flood control and/or navigation. The water control diagram or release schedule will be signed by a duly authorized representative of the Chief of Engineers, the project owner, and the designated operating agency, and will be used as the basis for carrying out this Regulation. Each diagram or schedule will contain a reference to this Regulation.

(ii) When deemed necessary by the Corps of Engineers, information given on the water control diagram or release schedule will be supplemented by appropriate text to assure mutual understanding on certain details or other important aspects of the water control plan not covered in this Regulation, on the water control diagram or in the release schedule. This material will include clarification of any aspects that might otherwise result in unsatisfactory project performance in the interest of flood control and/or navigation. Supplementation of the agreement will be necessary for each project where the Corps of Engineers exercises the discretionary authority to prescribe the flood control regulation on a day-to-day (real-time) basis. The agreement will include delegation of the responsibility. The document should also cite Section 7 of the 1944 Flood Control Act and congressional legislation authorizing construction of the project.

(iii) All flood control regulations published in the Federal Register under this Section (Part 208) of the Code prior to the date of this publication and listed in paragraph 208.11(e) are hereby superseded.

(iv) Nothing in this Regulation prohibits the promulgation of specific regu-

lations for a project in compliance with the authorizing Act (Sec. 7, Pub. L. 78-534, 58 Stat. 890 (33 U.S.C. 709)), when agreement on acceptable regulations cannot be reached between the Corps of Engineers and the owner.

(6) *Hydrometeorological instrumentation.* The project owner will provide instrumentation in the vicinity of the damsite and will provide communication equipment necessary to record and transmit hydrometeorological and reservoir data to all appropriate Federal authorities on a real-time basis. For those projects where the owner retains responsibility for real-time implementation of the water control plan, the owner will also provide or arrange for the measurement and reporting of hydrometeorological parameters required within and adjacent to the watershed and downstream of the damsite, sufficient to regulate the project for flood control and/or navigation in an efficient manner. When data collection stations outside the immediate vicinity of the damsite are required, and funds for installation, observation, and maintenance are not available from other sources, the Corps of Engineers may agree to share the costs for such stations with the project owner. Availability of funds and urgency of data needs are factors which will be considered in reaching decisions on cost sharing.

(7) *Project safety.* The project owner is responsible for the safety of the dam and appurtenant facilities and for regulation of the project during surcharge storage utilization. Emphasis upon the safety of the dam is especially important in the event surcharge storage is utilized, which results when the total storage space reserved for flood control is exceeded. Any assistance provided by the Corps of Engineers concerning surcharge regulation is to be utilized at the discretion of the project owner, and does not relieve the owner of the responsibility for safety of the project.

(8) *Notification of the general public.* The Corps of Engineers and other interested Federal and State agencies, and the project owner will jointly sponsor public involvement activities, as appropriate, to fully apprise the general public of the water control plan. Public meetings or other effective means of notification and involvement will be held, with the initial meeting being conducted as early as practicable but not later than the time the project first becomes operational. Notice of the initial public meeting shall be published once a week for three consecutive weeks in one or more newspapers of general circulation published in each county covered by the water control plan. Such notice shall also be used when appropriate to inform the public of modifications in the water control plan. If no newspaper is published in a county, the notice shall be published in one or more newspapers of general circulation within that county. For the purposes of this Section a newspaper is one qualified to publish public notices under applicable state law. Notice shall be given in the event significant problems are anticipated or experienced that will prevent carrying out the approved water control plan or in the event that an extreme water condition is expected that could produce severe damage to property or loss of life. The means for conveying this information shall be commensurate with the urgency of the situation. The water control manual will be made available for examination by the general public upon request at the appropriate office of the Corps of Engineers, project owner or designated operating agency.

(9) *Other generalized requirements for flood control and navigation.* (i) Storage space in the reservoirs allocated for flood control and navigation purposes shall be kept available for those purposes in accordance with the water control agreement, and the plan of regulation in the water control manual.

(ii) Any water impounded in the flood control space defined by the water control agreement shall be evacuated as rapidly as can be safely accomplished without causing downstream flows to exceed the controlling rates; i.e., releases from reservoirs shall be restricted insofar as practicable to quantities which, in conjunction with uncontrolled runoff downstream of the dam, will not cause water levels to exceed the controlling stages currently in force. Although conflicts may arise with other purposes, such as hydropower, the plan or regulation may require releases to be completely curtailed in the interest of flood control or safety of the project.

(iii) Nothing in the plan of regulation for flood control shall be construed to require or allow dangerously rapid changes in magnitudes of releases. Releases will be made in a manner consistent with requirements for protecting the dam and reservoir from major damage during passage of the maximum design flood for the project.

(iv) The project owner shall monitor current reservoir and hydrometeorological conditions in and adjacent to the watershed and downstream of the damsite, as necessary. This and any other pertinent information shall be reported to the Corps of Engineers on a timely basis, in accordance with standing instructions to the damtender or other means requested by the Corps of Engineers.

(v) In all cases where the project owner retains responsibility for real-time implementation of the water control plan, he shall make current determinations of: reservoir inflow, flood control storage utilized, and scheduled releases. He shall also determine storage space and releases required to comply with the water control plan prescribed by the Corps of Engineers. The owner shall report this information on a timely basis as requested by the Corps of Engineers.

(vi) The water control plan is subject to temporary modification by the Corps of Engineers if found necessary in time of emergency. Requests for and action on such modifications may be made by the fastest means of communication available. The action taken shall be confirmed in writing the same day to the project owner and shall include justification for the action.

(vii) The project owner may temporarily deviate from the water control plan in the event an immediate short-term departure is deemed necessary for emergency reasons to protect the safety of the dam, or to avoid other serious hazards. Such actions shall be immediately reported by the fastest means of communication available. Actions shall be confirmed in writing the same day to the Corps of Engineers and shall include justification for the action. Continuation of the deviation will require the express approval of the Chief of Engineers, or his duly authorized representative.

(viii) Advance approval of the Chief of Engineers, or his duly authorized representative, is required prior to any deviation from the plan of regulation prescribed or approved by the Corps of Engineers in the interest of flood control and/or navigation, except in emergency situations provided for in paragraph d(9)(vii) above. When conditions appear to warrant a prolonged deviation from the approved plan, the project owner and the Corps of Engineers will jointly investigate and evaluate the proposed deviation to insure that the overall integrity of the plan would not be unduly compromised. Approval of prolonged deviations will not be granted unless such investigations and evaluations have been conducted to the extent deemed necessary by the Chief of Engineers, or his designated representatives, to fully substantiate the deviation.

(10) *Revisions.* The water control plan and all associated documents will be revised by the Corps of Engineers, as necessary, to reflect changed conditions that come to bear upon flood control and navigation, e.g., reallocation of reservoir storage space due to sedimentation or transfer of storage space to a neighboring project. Revision of the water control plan, water control agreement, water control diagram, or release schedule requires approval of the Chief of Engineers or his duly authorized representative. Each such revision shall be effective upon the date specified in the approval. The original (signed document) water control agreement shall be kept on file in the Office, Chief of Engineers, Department of the Army, Washington, D.C. Copies of the agreement shall be kept on file in and may be obtained from the office of the project owner, or from the office of the appropriate Division Engineer, Corps of Engineers.

(11) FEDERAL REGISTER. The following information for each project subject to Section 7 of the 1944 Flood Control Act shall be published in the FEDERAL REGISTER prior to the time the project becomes operational and prior to any significant impoundment before project completion or * * * at such time as the responsibility for physical operation and maintenance of the Corps of Engineers

wned projects is transferred to another ntity: (i) reservoir, dam, and lake ames, (ii) stream, county and state orresponding to the damsite location, iii) the maximum current storage space n acre-feet to be reserved exclusively for lood control and/or navigation purposes, or any multiple-use space (interminglied) when flood control or navigation is one of the purposes, with corresponding elevations in feet above mean sea level, and area in acres, at the upper and lower limits of said space, (iv) the name of the project owner, and (v) congressional legislation authorizing the project for Federal participation.

(c) *List of projects.* The following tables, "PERTINENT PROJECT DATA—SECTION 208.11 REGULATION," show the pertinent data for projects which are subject to this Regulation.

PERTINENT PROJECT DATA - SECTION 208.11 REGULATION

PROJECT NAME	STREAM	COUNTY & STATE	EXCLUSIVE FLOOD CONTROL/NAVIGATION STORAGE 1000 ac-ft.	ELEV. LIMITS feet m.s.l. UPPER	LOWER	AREA acres UPPER	LOWER	MULTIPLE-USE FLOOD CONTROL/NAVIGATION STORAGE 1000 ac-ft.	ELEV. LIMITS feet m.s.l. UPPER	LOWER	AREA acres UPPER	LOWER	PROJECT OWNER	AUTH. LEGI.
Alpine Dam	Keith Creek	Winnebago, Il.	0.585	796.0	764.0	51.88	0	-	-	-	-	-	City of Rock-Ford, Il	FWA Proj.
Agency Valley Dam & Res.	N. Fork Malheur River	Malheur, Or.	-	-	-	-	-	60.0	3340.0	3263.21	1900	0	Bureau of Rec.	PL 68-292
Bear Creek Dam	Bear Creek	Marion & Ralls, Mo.	8.7	564.5	520.0	540	0	-	-	-	-	-	City of Hannibal, Mo.	PL 83-780
Big Dry Creek and Diversion	Big Dry Creek and Dog Creek	Fresno, Ca.	16.25	425.0	393.0	1330	0	-	-	-	-	-	Reclamation Board Ca.	PL 77-228
Bonny Dam & Res.	S. Fork Republican River	Yuma, Co.	128.0	3710.0	3672.0	5,036	2042	-	-	-	-	-	Bureau of Rec.	PL 78-534
Boysen Dam & Res.	Wind River	Fremont, Wy.	150.0	4732.2	4725.0	22116	19360	150	4725.0	4717.0	19360	16955	Bureau of Rec.	PL 78-534
Bully Creek Dam & Reservoir	Bully Creek	Malheur, Or.						31.65	2523.0	2456.8	1082	140	Bureau of Rec.	PL 86-249
Comanche Dam & Reservoir	Mokelumne River	San Joaquin, Ca.	-	-	-	-	-	200.0	233.5	205.1	7600	5507	East Bay Mun Util Dist, Oakland, Ca.	PL 86-645
Cedar Bluff Dam & Reservoir	Smoky Hill River	Trego, Ks.	192.0	2166.0	2144.0	10790	6869	-	-	-	-	-	Bureau of Rec.	PL 78-534
Clark Canyon Dam & Reservoir	Beaverhead River	Beaverhead, Mt.	79.1	5560.4	5546.1	5903	5160	30.3	5546.1	5535.7	5160	4496	Bureau of Rec.	PL 78-534
Devil Creek Dam & Reservoir	Devil Creek, Malad River	Oneida, Id.	-	-	-	-	-	2.8	5173.4	5156.1	140	100	Malad Valley Irrigating Co.	PL 84-984

PERTINENT PROJECT DATA - SECTION 208.11 REGULATION

NAME	STREAM	STATE	EXCLUSIVE FLOOD CONTROL/NAVIGATION STORAGE 1000 ac-ft.	ELEV. LIMITS feet m.s.l. UPPER	ELEV. LIMITS feet m.s.l. LOWER	AREA acres UPPER	AREA acres LOWER	MULTIPLE-USE FLOOD CONTROL/NAVIGATION STORAGE 1000 ac-ft.	ELEV. LIMITS feet m.s.l. UPPER	ELEV. LIMITS feet m.s.l. LOWER	AREA acres UPPER	AREA acres LOWER	PROJECT OWNER	AUTH. LEGIS.
Emigrant Dam & Reservoir	Emigrant Creek	Jackson, Or.	39.0	2241.0	2131.5	801	80	-	-	-	-	-	Bureau of Rec.	PL 83-606
Enders Dam & Reservoir	Frenchman Creek	Chase, Nb.	30.9	3127.0	3112.3	2405	1707	-	-	-	-	-	Bureau of Rec.	PL 78-534
Folsom Dam & Lake	American River	Sacramento, Ca.	-	-	-	-	-	400.0	466.0	427.0	11450	9040	Bureau of Rec.	PL 81-356
Friant Dam & Res (Millerton Lake)	San Joaquin River	Fresno, Ca.	-	-	-	-	-	390.0	578.0	466.3	4850	2101	Bureau of Rec.	PL 75-392 & PL 76-868
Glen Elder Dam & Waconda Lake	Solomon River	Mitchell, Ks.	722.8	1488.3	1453.6	33482	12602	-	-	-	-	-	Bureau of Rec.	PL 78-534 & PL 79-526
Glendo Dam & Reservoir	North Platte River	Platte, Wy.	271.9	4653.0	4635.0	17986	12365	-	-	-	-	-	Bureau of Rec.	PL 78-534
Heart Butte Dam & Lake Tschida	Heart River	Grant, N.D.	150.0	2094.5	2064.5	8625	3400	-	-	-	-	-	Bureau of Rec.	PL 78-534
Hoover Dam & Lake Mead	Colorado River	Clark NV & Mohave, Az.	1500.0	1229.0	1219.6	162700	156300	15853.0	1219.6	1083.0	156300	83300	Bureau of Rec.	PL 70-642
Angry Horse Dam & Reservoir	S. Fork Flathead River	Flathead, Mt.	2982.0	3360.0	3336.0	23800	5400	-	-	-	-	-	Bureau of Rec.	PL 78-329
Jamestown Dam & Reservoir	James River	Stutsman, N.D.	185.4	1454.0	1432.67	13206	2555	6.6	143267	1429.8	2355	2083	Bureau of Rec.	PL 78-534
Keyhole Dam & Reservoir	Belle Fourche River	Crook, Wy.	140.2	4111.3	4099.3	13686	9394	-	-	-	-	-	Bureau of Rec.	PL 78-534

PERTINENT PROJECT DATA - SECTION 208.11 REGULATION

PROJECT NAME	STREAM	COUNTY & STATE	EXCLUSIVE FLOOD CONTROL/NAVIGATION STORAGE 1000 ac-ft.	ELEV. LIMITS feet m.s.l. UPPER	ELEV. LIMITS feet m.s.l. LOWER	AREA acres UPPER	AREA acres LOWER	MULTIPLE-USE FLOOD CONTROL/NAVIGATION STORAGE 1000 ac-ft.	ELEV. LIMITS feet m.s.l. UPPER	ELEV. LIMITS feet m.s.l. LOWER	AREA acres UPPER	AREA acres LOWER	PROJECT OWNER	AUTH. LEGIS.
Kirwin Dam & Reservoir	N. Fork Solomon River	Phillips, Ks.	215.115	1757.3	1729.25	10640	5080	-	-	-	-	-	Bureau of Rec.	PL 78-534
Little Wood River Dam & Reservoir	Little Wood River	Blain, Id.	30.0	5237.3	5127.8	574	0	-	-	-	-	-	Bureau of Rec.	PL 84-993
Logan Martin Dam & Reservoir	Coosa River	Talladega, Al	245.3	477	465	26310	15260	-	-	-	-	-	Alabama Power Co.	PL 83-436
Los Banos Dam & Detention Res.	Los Banos Creek	Merced, Ca.	-	-	-	-	-	14.0	353.5	327.8	613	467	Bureau of Rec.	PL 86-488
Lovewell Dam & Reservoir	White Rock Creek	Jewell, Ks.	50.0	1393.3	1382.6	3025	2986	-	-	-	-	-	Bureau of Rec.	PL 78-534
Markham Ferry Dam & Lake Grand R. Hudson	Grand (Neosho) River	Mayes, Ok.	244.2	636.0	619.0	18800	10900	-	-	-	-	-	Grand River Dam Authority	PL 76-478
Medicine Creek Dam & Harry Strunk Lake	Medicine Creek	Frontier, Nb.	52.9	2386.2	2366.1	3463	1830	-	-	-	-	-	Bureau of Rec.	PL 78-534
New Exchequer Dam & Lake McClure	Merced River	Tuolumne, Ca.	-	-	-	-	-	400.0	867.0	799.7	7110	4849	Merced Irrigation Dist	PL 84-849
Norton Dam & Reservoir	Prairie Dog Creek	Norton, Ks.	100.0	2331.4	2304.3	3316	2181	-	-	-	-	-	Bureau of Rec.	PL 78-534

PERTINENT PROJECT DATA - SECTION 208.11 REGULATION

PROJECT NAME	STREAM	COUNTY & STATE	EXCLUSIVE FLOOD CONTROL/NAVIGATION STORAGE 1000 ac-ft.	ELEV. LIMITS feet m.s.l. UPPER	LOWER	AREA acres UPPER	LOWER	MULTIPLE-USE FLOOD CONTROL/NAVIGATION STORAGE 1000 ac-ft.	ELEV. LIMITS feet m.s.l. UPPER	LOWER	AREA acres UPPER	LOWER	PROJECT OWNER	AUTH. LAW
Ochoco Dam & Reservoir	Ochoco Creek	Crook, Or.	51.4	3136.2	3048.1	1150	120	-	-	-	-	-	Bureau of Rec.	PL [illegible]
Oroville Dam & Lake	Feather River	Butte, Ca.	-	-	-	-	-	750.0	900.0	868.5	15800	13346	Calif. Dept of Water Resources	PL [illegible]
Pactola Dam & Reservoir	Rapid Creek	Pennington, S.D.	43.0	4621.5	4580.2	1232	860	-	-	-	-	-	Bureau of Rec.	PL [illegible]
Palisades Dam & Reservoir	Snake River	Bonneville, Id.	1202.0	5620.0	5452.43	16100	2170	-	-	-	-	-	Bureau of Rec.	PL [illegible]
Platora Dam & Reservoir	Conejos River	Conejos, Co.	6.0	10034.0	10027.5	947	920	540	10027.5	994.5	920	0	Bureau of Rec.	PL [illegible]
Prineville Dam & Reservoir	Crooked Creek	Crook, Or.	153.0	3234.8	3112.0	2990	120	-	-	-	-	-	Bureau of Rec.	PL [illegible]
Prosser Creek & Reservoir	Prosser Creek	Nevada, Ca.	-	-	-	-	-	20.0	5741.2	5703.7	745	334	Bureau of Rec.	PL [illegible]
Red Willow Dam & Hugh Butler Lake	Red Willow Creek	Frontier, Nb.	50.0	2604.9	2581.8	2682	1629	-	-	-	-	-	Bureau of Rec.	PL [illegible] & PL [illegible]
Savage River Dam & Reservoir	Savage River	Garrett, Md.	-	-	-	-	-	16.028	1468.5	1400.0	388	127	Upper Potomac River Commission	PL [illegible]
Shadehill Dam & Reservoir	Grand River	Perkins, S.D.	217.7	2302.2	2272.0	9900	4800	-	-	-	-	-	Bureau of Rec.	PL [illegible]
Shasta Dam & Lake	Sacramento River	Shasta, Ca.	-	-	-	-	-	1300.0	1062.0	1018.6	29570	23894	Bureau of Rec.	PL [illegible] & PL [illegible]

PERTINENT PROJECT DATA - SECTION 208.11 REGULATION

PROJECT NAME	STREAM	COUNTY & STATE	EXCLUSIVE FLOOD CONTROL/NAVIGATION STORAGE 1000 ac-ft.	ELEV. LIMITS feet m.s.l. UPPER	LOWER	AREA acres UPPER	LOWER	MULTIPLE-USE FLOOD CONTROL/NAVIGATION STORAGE 1000 ac-ft.	ELEV. LIMITS feet m.s.l. UPPER	LOWER	AREA acres UPPER	LOWER	PROJECT OWNER	AUTH. LAW
Trenton Dam & Reservoir	Republican River	Hitchcock, Nb.	134.0	2773.0	2752.0	7975	4974	-	-	-	-	-	Bureau of Rec.	PL [illegible]
Twitchell Dam & Reservoir	Cuyama River	Santa Barbara, Ca.	89.0	651.5	623.0	3690	2650	-	-	-	-	-	Bureau of Rec.	PL [illegible]
Warm Springs Dam & Res.	Middle Fork Malheur River	Malheur, Or.	-	-	-	-	-	191.0	3406.0	3327.0	4600	90	50% Vale Irr Dist. & 50% Bureau of Rec.	-
Waterbury Dam & Reservoir	Little River	Washington, Vt.	27.7	817.5	592.0	1330	890	-	-	-	-	-	State of Vermont	PL [illegible]
Weiss Dam & Reservoir	Coosa River	Cherokee, Al.	397.0	574	546	50000	30200	-	-	-	-	-	Alabama Power Co.	PL [illegible]
Yellowtail Dam & Bighorn Lake	Bighorn River	Big Horn, Mt.	259.0	3657.0	3640.0	17238	12683	230.0	3640.0	3614.0	12683	7410	Bureau of Rec.	PL [illegible]

Nos. 80-1137, 80-1145 and 80-1178

In the Supreme Court of the United States

OCTOBER TERM, 1980

APPALACHIAN INSURANCE CO., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

AID INSURANCE CO., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

AETNA INSURANCE CO., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners seek reimbursement from the United States for millions of dollars in insurance claims they paid as a

result of the 1976 collapse of the uncompleted Teton Dam. The United States moved to dismiss the suit under Section 3 of the Flood Control Act of 1928, 33 U.S.C. 702c. That Section provides, in pertinent part, that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place * * * ." The United States District Court for the District of Idaho denied the motion, holding that Section 702c immunity applies solely to federal flood control projects and finding that the Teton Dam was neither designated nor actually operating as such a project (Pet. App. A-12 to A-13)[1]. On interlocutory appeal pursuant to 28 U.S.C. 1292(b), the court of appeals reversed, concluding that the Teton Dam was indeed a flood control project (Pet. App. A-3 to A-5) and rejecting various other arguments advanced by petitioners (*id.* at A-5 to A-7).

The court of appeals' decision is correct and we rely fully on its reasoning. There is no conflict among the circuits nor any other reason for further review.

1. 33 U.S.C. 702c, on its face, creates an unqualified immunity: the United States is exempt from "liability of any kind * * * for any damage from or by floods or flood waters at any place * * * ." In enacting the statute, Congress "safeguarded the United States against liability of any kind for damage from or by floods or flood waters in the broadest and most emphatic language." *National Mfg. Co.* v. *United States*, 210 F. 2d 263, 270 (8th Cir.), cert. denied, 347 U.S. 967 (1954). Therefore, inasmuch as the damage suffered by petitioners' insureds indisputably was caused by the collapse of the Teton Dam and the resulting flood, the court of appeals need not have looked beyond the plain language of Section 702c to hold the United States immune from liability.

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[1]"Pet. App." refers to the appendices in No. 80-1137.

Instead, the court of appeals gave petitioners the benefit of a judicial gloss limiting the statute's applicability to flood losses connected to government flood control projects. Petitioners, relying on the failure of the Teton Dam Authorization Act (Pub. L. No. 88-583, 78 Stat. 925) to specify flood control as a purpose to be served by the Teton Dam, argue that the dam should not be considered a flood control project. However, the Authorization Act's legislative history makes plain that flood control was a major factor underlying the dam's construction. See, *e.g.*, H.R. Rep. No. 1715, 88th Cong., 2d Sess. 3-4 (1964) ("[T]he project would also provide substantial flood protection * * *."); S. Rep. No. 1127, 88th Cong., 2d Sess. 3 (1964) ("[T]he disastrous flood of February 1962 dramatically reemphasized the need for the construction proposed."). There is not the slightest evidence that Congress ever disavowed this flood control purpose. In short, as the court of appeals held (Pet. App. A-5), "[f]lood control was beyond question a purpose of the Teton Basin Project." Accordingly, if a flood control nexus is necessary to trigger the government's Section 702c immunity, the court of appeals correctly found that the nexus exists here. See also *Trout Unlimited* v. *Morton*, 509 F. 2d 1276, 1279 (9th Cir. 1974).[2]

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[2]The court of appeals also correctly rejected petitioners' argument that Section 702c applies only where the sole or primary purpose of a water project is flood control and the sole agency involved in furthering that purpose is the Army Corps of Engineers (Pet. App. A-3 to A-4). The courts of appeals consistently have held that the government is immune from liability for flood damages in circumstances where the water project has multiple purposes and is operated by agencies other than or in addition to the Corps of Engineers. See, *e.g.*, *Taylor* v. *United States*, 590 F. 2d 263 (8th Cir. 1979); *Lenoir* v. *Porters Creek Watershed Dist.*, 586 F. 2d 1081 (6th Cir. 1978); *McClaskey* v. *United States*, 386 F. 2d 807 (9th Cir. 1967). Were the rule otherwise, the root policy of Section 702c—to enable the government to engage in expensive flood control projects without fear of unbounded monetary liability—would, as the court of appeals recognized (Pet. App. A-4,

2. Petitioners also argue that Section 702c does not immunize the government from liability for floods resulting solely from negligence. Petitioners contend that the immunity comes into play only where "natural" flooding caused the loss. However, every court of appeals to consider this argument has rejected it. See, *e.g.*, *Burlison* v. *United States*, 627 F. 2d 119, 121 (8th Cir. 1980); *Florida East Coast Ry.* v. *United States*, 519 F. 2d 1184, 1191 (5th Cir. 1975); *Parks* v. *United States*, 370 F. 2d 92, 93 (2d Cir. 1966); *Stover* v. *United States*, 332 F. 2d 204, 206 (9th Cir.), cert. denied, 379 U.S. 922 (1964). These decisions make obvious sense. Congress intended in Section 702c to immunize the government from flood-related expenditures beyond those authorized for the construction of flood control projects, not to increase the government's financial exposure by imposing liability for negligent construction. As the court of appeals recognized, petitioners' proposed distinction between natural and man-made floods "would necessarily frustrate section 702c's purpose of permitting the government to engage in flood control without fear of liability," and would "lead the court into the morass of 'contributing causes,' 'superseding causes', and 'intervening causes' " (Pet. App. A-6).

3. Petitioners' argument that Section 702c applies only to Mississippi River flood control projects is equally insubstantial. Every court to consider the question has ruled that,

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A-6), be defeated. The Fourth Circuit's decision in *Hayes* v. *United States*, 585 F. 2d 701 (1978), upon which the petitioners in No. 80-1145 rely, does not dictate a contrary result. In refusing to affirm the district court's dismissal of the complaint based on the government's immunity, the *Hayes* court held that to the extent flood damages result from the operation of a multi-purpose water project for recreational purposes, the government is not entitled to Section 702c immunity. Whatever the merits of that decision, it is inapplicable here since the Teton Dam was still under construction when it collapsed and was not being operated for any particular purpose.

although the 1928 Act of which Section 702c was a part was aimed at projects on the Mississippi River, the immunity provision broadly applies to all government flood control efforts. See, *e.g.*, *Lenoir* v. *Porters Creek Watershed Dist.*, 586 F. 2d 1081, 1086 (6th Cir. 1978); *Callaway* v. *United States*, 568 F. 2d 684, 686 (10th Cir. 1978). Moreover, many courts have held that the 1936 Flood Control Act re-enacted the 1928 immunity provision and independently made it applicable to all flood projects. See, *e.g.*, *National Mfg. Co.* v. *United States, supra*, 210 F. 2d at 270. And "[m]ost persuasive perhaps is the plain language of [33 U.S.C. 702c] itself. It applies to floods 'at any place.' " *Lenoir* v. *Porters Creek Watershed Dist.*, *supra*, 586 F. 2d at 1086 n.4. As the court of appeals observed (Pet. App. A-5), it is too late in the day for the courts to abandon this settled line of precedent, upon which millions of dollars in federal flood control investments rest. Cf. *Flood* v. *Kuhn*, 407 U.S. 258, 282-285 (1972).[3]

It is therefore respectfully submitted that the petitions for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

FEBRUARY 1981

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[3]Petitioners' various other arguments also lack merit. We comment only on their view that the Teton Dam Disaster Assistance Act, Pub. L. No. 94-400, 90 Stat. 1211, repealed by implication the government's Section 702c immunity in this case. That Act compensated all those suffering personal or property loss from the Teton Dam disaster, but expressly excluded insurance companies. Although Congress left the insurance companies free to file Federal Tort Claims Act suits, the Assistance Act nowhere suggests that such suits would not be subject to the usual defenses, including, of course, any immunity the government might enjoy.

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